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Standing at Energy Regulators in Alberta

Issue update and recommendations

Nikki Way, Adam Driedzic, and Duncan Kenyon

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Contents

1. Introduction

The goal of this project is to help improve the processes used by energy regulators in Alberta to incorporate environmental considerations and the concerns of persons impacted by energy development into regulatory decisions. The regulators covered include the Alberta Energy Regulatory (AER) and Alberta Utilities Commission (AUC). The AER regulates oil, gas, coal and oilsands development. It was created to be a "single regulator" where, in cases of these hydrocarbon industries, the AER performs functions that would otherwise be carried out by the environmental and public lands regulators. The AUC regulates the electricity and natural gas utilities sectors.

The focus is on standing at regulatory hearings, understanding that this is only one type of public participation at one point in the energy development process. Standing is an ongoing issue in Alberta that has already been subject to a considerable amount of litigation, commentary and discussion in recent years.[1] Much of this debate concerns the use in Alberta of a legislated model whereby persons who seek hearings must show evidence that they either are or may be "directly" and/or and "adversely" affected. While the focus is on the AER and AUC, it is crucial to understand that this approach to standing is used for every type of provincial board or tribunal that may hold hearings on energy, natural resource, environment or land use decisions, as well as for most other opportunities to participate in the regulatory system, such as filing statements of concern on environmental assessments and regulatory applications.

[1]Adam Driedzic, *Standing in Environmental Matters* (Edmonton: Environmental Law Centre, 2014). Available online: http://elc.ab.ca/publications/available-to-download/ [ELC Report on Standing]; Public Participation in Alberta's Energy and Natural Resource Development: Is there Room for Improvement? Conference, Calgary 2010 (Calgary: Canadian Institute of Resources Law, 2010). Available online: https://cirl.ca/publications/conference-proceedings [CIRL Conference]; Cindy Chiasson and Jodie Hierleier, *Public Access to Environmental Appeals*, (Edmonton: Environmental Law Centre, 2006). [ELC Environmental Appeals]; For specific case and decision commentaries see, among numerous others: Nigel Banks, "Directly and Adversely Affected: The Actual Practice of the Alberta Energy Regulator" (2014) ablawg. Available online: http://ablawg.ca/2014/06/03/4447/; Shaun Fluker, "No Public Interest Standing and the Alberta Environmental Appeals Board" (2013) ablawg. Available online: http://ablawg.ca/author/sfluker/page/11/; Shaun Fluker, "Public Interest Standing and a Statutory Right of Appeal" (2011) ablawg. Available online: http://ablawg.ca/2011/11/22/public-interest-standing-and-a-statutory-right-of-appeal/; Shaun Fluker, "The continuing mystery of standing at the Energy Resources Conservation Board" (2011) ablawg. Available online: http://ablawg.ca/2011/02/14/the-continuing-mystery-of-standing-at-the-energy-resources-conservation-board/ ; Adam Driedzic, "Can administrative agencies grant common law public interest standing?" (2012) 39:3 Law Now, Special Report. Available online: http://www.lawnow.org/administrative-agencies-public-interest-standing/

Comments from a public interest perspective and especially from organizations with experience seeking to participate in regulatory process have consistently been that the Alberta approach is overly restrictive and ill-suited for the nature of the substantive issues and the interests at stake. This growing body of commentary consistently recommends the recognition of standing based on more relaxed interest requirements. In contrast, official initiatives concerning energy regulation in Alberta, most notably the Regulatory Enhancement Project leading to creation of the AER, have maintained the directly and adversely affected tests. Published material supporting continuation of this model is often less focused on standing specifically and more concerned with clarifying agency mandates, streaming public participation, and promoting efficiency throughout the energy regulatory process.

This stark contrast between past commentaries and policy direction, as well as the framing of the standing issue, suggest several knowledge gaps around standing at energy regulators in Alberta. Further, most past commentaries predate creation of the AER as a single regulator for hydrocarbon projects, or at least any findings on this current system in practice. Both the AER and the AUC show recent evidence of increasing rules, procedures, guidance to participants and published decisions related to standing. These initiatives suggest efforts on the part of the regulators to clarify standing, formalize participant roles, and manage hearing processes within their legislated mandates.

This report provides an update on this longstanding issue in Alberta in light of the recent developments, and discusses learnings and opportunities for improvement for decision-making at both provincial energy regulators.

The report aims to assist in three particular areas:

1. Greater understanding of how current practices at the AER and AUC compare to each other and to the prior system; for example:
    - How are legal tests for standing interpreted and applied?
    - How do regulators view and exercise discretion to trigger hearings and determine standing?
    - What guidance is provided by regulations, rules and directives and decision documents?
2. Empirical evidence of the positive and negative impacts of the standing regime; for example:
    - Has participation improved the substantive quality of regulatory decisions, or conversely, has lack of standing and hearings contributed to weaker decisions?

    - Has participation helped legitimize decisions, or has its absence contributed to lack of support?
    - Are efficiency concerns with broad standing borne out in terms of the number of hearings or the ability to manage those hearings that occur?
    - Can the harms and costs of regulatory inefficiency be quantified, and if so are they attributable to standing?
    - Where does the "balance of efficiency" fall with respect to allowing or restricting participation in regulatory decisions?
3. How does standing in Alberta compare to other provinces and countries featuring similar natural resource industries and legal regimes? What mandates are provided to the energy (as compared to the environmental) regulatory agencies, what use is made of hearings, and what are the approaches to standing and public participation in these examples?

Concerning the AER, this report provides one of the first comprehensive external reviews of matters such as:

- Does the new structure and mandate of the AER impact standing?
- How is the AER working as a substitute for the environmental regulators with respect to standing?
- Did the Regulatory Enhancement Project adequately consider pre-existing issues around standing at the environmental regulators?
- What are the prospects for new models of proceedings?
- How will standing be dealt with in processes that challenge the policy/regulatory distinction?

The above inquiry feeds into a discussion on points including:

- Is the case for reform to standing made out or altered by recent developments?
- What are the attributes or features of a more comprehensive public participation framework?
- What are the options and recommendations for Alberta on a spectrum ranging from further institutional and legislative reforms to the development of administrative rules and practices?

This report should help provide a better understanding for legislators and policy developers of the nature of the standing issue in Alberta, the practical outcomes of the current regime, and vision for improvement.

2. Roots of the standing issue

This section provides background on the definitions of standing, why standing is contentious, how standing is determined, and how standing at administrative boards and tribunals compares to standing in court. Much of this material is provided in the Environmental Law Centre Report *Standing in Environmental Matters* (2014). However, it is particularly important for readers to understand the root of the issues and the following section is more specifically geared towards the context of energy regulators in Alberta.

2.1 What is standing?

Standing is basically the legal status necessary to receive a hearing from a court or an administrative decision-maker such as a board or tribunal.[2] Exactly defining standing is hard, and some uncertainties relevant to energy regulators in Alberta include:

- Standing can mean the "right" to a hearing; however, this is not always the case.
- Standing can often be granted or denied at the discretion of decision-makers, more so where persons represent public interests rather than where persons are directly affected.
- Standing typically refers to being a "party" to the hearing.
- Parties have further rights, for example the ability to raise issues, lead evidence, challenge evidence, seek costs, receive notice of decisions and request appeals.
- Hearings can involve participants that do not have full party standing.
- In many models standing is what triggers a hearing; however, hearings can be triggered in other ways, and not all forms of standing involve rights to a hearing.

Overall, standing might best be understood as a "gatekeeper" tool that can determine whether hearings are held, what issues are decided, what interests will be represented and by whom.[3]

2.2 Why is standing contentious?

Generally, standing is mostly contentious in two situations:

[2] ELC Report on Standing, *supra* note 1.
[3] *Ibid.*

- where it would trigger hearings that would not otherwise occur.
- where hearings are certain to occur and could be large or lengthy.

However, in the later situation it is crucial to distinguish issues of standing from other issues around participant roles and process management.

The contentiousness of standing has very deep roots in the legal, political, and institutional system. Some such issues to consider include:

- global trends in public participation,
- the nature of western rights regime,
- the natural resources regime,
- the origins of the standing tests, and
- the lack of special standing principles for energy, natural resources or environmental matters.

Global trends

Alberta is definitely not alone in experiencing contentions around standing. This experience is part of a global trend in recent decades towards increasing demands for public participation in energy and natural resource development. The overall trend in history has been to expand the sphere of participation, first to hear from persons subject to regulatory decisions, then from other directly affected people, and now from an even broader range of people in many models. There are also examples of reforms in multiple jurisdictions discussed below that resemble backlash against broad participation. This is similar to the challenges articulated by the courts around striking a balance between competing rationales.

Rights regime

Standing is an issue in public law matters of all kinds, though issues are especially acute where matters concern the environment and natural resources. The legal issues around standing may be greatest in common law countries, despite the perception that western democracy is more amenable to public participation.

Questions of participation in energy development and environmental protection decisions are linked to questions of property rights, human rights, environmental rights, and Aboriginal rights. These are all very different types of rights whose status in the legal regime varies significantly.

Property rights are the most established in law and the easiest to recognize. Examples include ownership, entitlements, and permissions to use land and natural resources.

Private property rights are the easiest to recognize as they are individually held by legal persons. However, private property rights are not constitutionally protected from infringement by regulatory decisions.

Aboriginal rights are legally unique. They are collectively held and only enforceable against the Crown. Aboriginal rights are constitutionally protected and can only be extinguished by the federal government with plain intention; their existence creates positive duties on the Crown. These duties include the duty to consult and accommodate where rights might be impacted by government decisions.

Environmental rights are the furthest from being established. The human rights regime in Western constitutional democracies including Canada mostly recognizes "negative rights," meaning that it protects individuals from interference by the state. Courts are loath to recognize "positive duties" on government to provide public benefits in the absence of legislation providing such duties. Environmental rights are not written into the constitution and depend heavily on ordinary legislation. Rights in legislation are mostly procedural rights like standing rather than substantive rights to environmental quality or public environmental health.

Property, Aboriginal and environmental rights can foster divergent interests in regulatory proceedings. For example, a landowner might prefer that an oil well be located in a wetland so that it does not interfere with agricultural land use. For another example, First Nations can settle claims with government and enter impact-benefits agreements with project proponents. Assuming that including landowners and Aboriginal Peoples in regulatory proceedings addresses environmental considerations is a mistake.

Natural resources regime

Natural resource legislation as a whole is fairly "rights-based" in the sense that it functions to grant rights and permissions to use public resources. As such, the greatest duties of fairness and process have historically been owed to persons seeking to use resources or to impact the environment rather than persons impacted by this use. In that regard, hearing from directly and adversely affected persons is an expansion of participation as compared to hearing only from project proponents or persons subject to regulatory decisions. However, standing for directly affected persons in this context more reflects common law duties of fairness than the substantive issues to be determined.

Old tests and new issues

The "directly and adversely affected" test for standing is one of numerous semantically similar requirements for individuals to be prejudiced or aggrieved in order to have standing. this is basically the historic model of standing that was developed by the courts for use in the adversarial litigation of private disputes. This development occurred before the age of the "regulatory state," the proliferation of public law issues in the courts, and the use of administrative boards and tribunals to hold hearings.

The common law rules for standing in court further include a "public nuisance rule" that restricts public ability to enforce public rights. The appropriate plaintiff to enforce public rights is considered to be the Attorney General and the Attorney General has discretion to not prosecute. Any private citizen seeking to enforce public rights without the consent of the Attorney General to do so must show that their own private rights have been infringed at the same time, or that they have suffered some special harm different than the public at large. As discussed below, some narrow interpretations of standing tests at regulatory agencies in Alberta come close to replicating this public nuisance rule.

In the courts, these narrow tests for standing have long been recognized by law reform commissions, commentators, and even by the courts themselves as deficient for public law matters .[4] These numerous criticisms of the "directly affected" tests and the "public nuisance rule" are quite consistent. Repeat comments include:

- The tests are vague, difficult to articulate and challenging to apply.
- In practice, it can prove difficult to determine standing as a preliminary matter separate from the merits of the substantive claims due to the evidentiary needs to establish direct effect.
- It is simply impossible for governments to represent all public interests due to the number of political, financial and bureaucratic constraints.

[4] Ontario Law Reform Commission, Report on the Law of Standing (1989) Report on the Law of Standing at 39.9 http://digitalcommons.osgoode.yorku.ca/library_olrc/135/ [Ontario Law Reform Commission]; Australian Law Reform Commission, Beyond the Door Keeper, Standing to Sue for Public Remedies, ALRC Report 78, (1996), online: http://www.alrc.gov.au/report-78 [Australian Law Reform Commission]; South Africa Law Commission, The Recognition of Class Actions and Public Interest Actions in South African Law, Project 88, (1998) 15, aonline: http://salawreform.justice.gov.za/reports/r_prj88_classact_1998aug.pdf ; Thomas Cromwell, *Locus Standing: A commentary on the law of standing in Canada* (Toronto: Carswell, 1986); among other sources.

- The historic tests and their practical application favour private property rights and economic interests, and this has proven detrimental to the substantive consideration of environmental, health or cumulative impacts.

Overall, relying on these tests is largely a poor fit with the nature of many environmental issues in which the interests at stake are collectively held and the impacts on these interests are indirect or cumulative.

Accordingly, law reform recommendations around the common law world have proposed changing this historic tests or reducing the evidentiary barriers to standing in public law matters so that issues may be heard.[5]

No special principles for environment or natural resource matters

Standing in energy, natural resource and environmental matters is not a discrete topic with its own principles. Most past sources and this report discuss standing in broader contexts. Some examples include:

- Broader issues of public participation and human rights in energy development process.
- Standing in court as compared to standing at administrative agencies.
- Standing at administrative boards and tribunals in general.
- Standing and other issues of administrative procedure like notice of proceedings and decisions, costs or participant funding, and access to information.

Examination of these other fields is beyond the main focus of this report; however, it remains important to consider standing in the context of institutional roles and systems design.

2.3 How is standing determined?

Determinations of standing can involve questions of law, fact, and policy.

Legal questions include: jurisdiction to determine standing, how tests for standing are articulated and interpreted, and questions of rights to a hearing. Much academic commentary and reform recommendations on standing concerns questions of law.

[5] *Ibid.*

Factual or evidentiary questions are rarely treated as a distinct topic in the academic commentary or the courts. Questions of law and fact tend to merge, and the facts needed to determine standing vary significantly with the nature of the tests.

Questions of fact are extremely important to individual determinations of standing under the "directly affected" tests used by Alberta regulators. Evidentiary issues discussed at length below include:

- The burden or "onus" of proof on the person seeking standing.
- What specifically must be shown as evidence of being directly affected.
- The "standard" of proof or evidentiary threshold that must be met.
- Determining standing as a preliminary matter separate from deciding the substantive issues, which is good practice however made challenging by the tests.

Much of the litigation on standing under narrow tests highlights issues around facts and evidence. While courts are apt to defer to tribunals on questions of fact, there may be a current trend towards judicial intervention into evidentiary barriers to standing created by tribunals.

Policy rationales behind the legal test for standing can be highly determinative of standing. The nature of the applicable policy rationales and the source of such policy is a key difference between standing at courts and standing at administrative boards and tribunals discussed at length below.

The extent to which questions of policy are recognized varies. Courts determining standing overtly consider their own policy rationales. In contrast, regulators and courts reviewing determinations of standing by regulators often state determinations of standing as involving questions of law and fact. In such cases the courts are apt to defer to the regulator's findings of fact unless such findings were unreasonable. However, more recent cases in Alberta and elsewhere have begun to consider the underlying policy rationales for granting standing and holding hearings at boards and tribunals. The relevant case law is discussed and cited below.

2.4 Standing and the mandate of the decision-maker

Understanding the similarities and differences between courts and administrative agencies is crucial to a discussion of standing at energy regulators in Alberta. This extends to considering the diversity of administrative boards and tribunals, of which the

energy regulators could be considered one type. To begin, the model of standing should fit the mandate of the particular decision-maker. Furthermore, questions of standing are tied to questions around the appropriate roles of the judicial, legislative and executive branches of government in relation to each other.

The main difference between standing at courts and at administrative tribunals concerns the source of legal rules and policy direction on standing. This is discussed at length below. Some of the more generic policy rationales are similar among diverse institutions, although still not identical. The Environmental Law Centre summarizes these rationales as:

> "Reasons for restrictive (or "narrow") standing include the baseline position of government as keeper of the public interest, concern with efficient use of decision-making resources, and concern with effects of standing on more directly affected third parties, especially in the regulatory context. These rationales are often articulated as the need to prevent "floodgates" and "busybodies."[6]

Reasons for relaxed (or "broad") standing include the practical need for public interest representation by non-government participants, upholding decision-making mandates by allowing issues suitable for determination to be heard, and allowing the representation of interests that should be considered in these decisions. These rationales may be expressed as concern with "fairness," "access to justice" or concern with accountability and procedural legitimacy."[7]

Despite these high level similarities between courts and at administrative tribunals, much of the policy on standing in the courts is very specific to the courts. Likewise, policy concerns around standing at energy regulators more closely resemble rationales for and against public participation in government decisions. This distinction has some legal recognition. For example, in international environmental law, the Aarhus Convention includes separate provisions for "public participation" in the environmental decision-making of public authorities, and "access to justice" in the courts so as to challenge public decisions.[8]

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[6] ELC Report on Standing, *supra* note 1.
[7] *Ibid.*
[8] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, United Nations Economic Commission for Europe (UNECE), 25 June 1998, online: http://ec.europa.eu/environment/aarhus/ [Aarhus Convention].

The greatest similarity between courts and administrative tribunals with respect to standing may be the practical challenge or ease with which a test for standing is articulated and applied in any given case. The challenges are definitely higher in applying the directly affected test as compared to more relaxed models of standing.

2.5 Lessons from standing in court

Standing in the courts can provide important lessons because it has been a documented issue for much longer than standing at regulatory agencies. Despite the different institutional context, the court experience provides insight into reforms to standing over time to address instances where public interest issues cannot be explored through the historic approach to standing, and the tensions between these reforms and the mandate of the courts.

The mandate of the courts is to decide questions of law through the adversarial litigation model. The basic concept of standing arguably evolved to serve this mandate. Standing is necessary to trigger any hearing and it was historically been tied to the enforceable rights of the plaintiff against the defendant. Standing in the courts is determined through common law principles unless legislation speaks to standing, and even then the courts may assert "inherent jurisdiction" to hear questions of legality.

As all historic common law approaches to standing for anyone other than the Attorney General generally require a person's private interests to be affected, the Canadian courts are well known for diverging from these historic rules to recognize "public interest standing." This is a discretionary form of standing that is not required to be granted. Instead, standing will be granted where there is a "serious and justiciable issue," a plaintiff shows a "genuine interest" and the litigation is an appropriate means for the issue to be heard. The legal test is to be applied flexibly as factors to consider rather than as a rigid checklist of criteria.[9]

The main limit on public interest standing in environmental matters is the narrow range of issues for which standing may be granted. Purely political issues are "non-justiciable" and will be left to the legislature. To date the only "serious" legal issues for which public interest standing has been granted to date are challenges to the constitutionality of

[9] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45,online at http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10006/index.do [Downtown Eastside.].

legislation or challenges to the legality of administrative action.[10] To date the courts have not granted public interest standing where the Attorney General would theoretically be an appropriate plaintiff, and this maintains barriers to non-government enforcement of environmental regulations.

The "genuine interest" requirement largely avoids evidentiary challenges and facilitates determination of standing as a preliminary matter. The courts will look to objective indicators of genuine interest, the most important of which are the purpose of organizations and their history of involvement in the subject matter. Prior involvement in the dispute or proceedings can be an indicator of interests but its absence does not work against standing. There is no need for individual members to be directly affected and no preference for groups formed for the litigation. Geographic proximity and adverse effects on interests are less relevant or less frequently considered. Environmental representatives ranging from community groups to large organizations have shown some propensity to meet the genuine interest requirement.

Requirement for the litigation to provide a "reasonable means" for the issue to be heard has historically created barriers to public interest standing due to the potential existence of more directly affected persons. The current jurisprudence has relaxed this requirement considering the practical unlikelihood of private plaintiffs in many cases. This requirement has never been the largest barrier in environmental cases as often no one is more directly affected than a public interest organization.

As policy rationales underlying the rules of standing in court are tied to the adversarial litigation model, it is important to understand the nature of litigation.

Litigation is inherently "backward looking," and the court relies on the facts of past events to determine disputed entitlements. This fuels assumptions that directly affected persons provide the best plaintiffs by providing concrete facts and strong arguments. For common law public interest standing, the court is consciously diverging from the general rules in order to meet its decision-making mandate, relying on the inherent jurisdiction of the courts to scrutinize legality. The jurisprudence also shows concern with "access to justice," and many public interest litigants do represent disadvantaged constituencies. These rationales for public interest standing are balanced against

[10] *Thorson v. Attorney General of Canada*, 1974 CanLII 6 (SCC). online at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/4263/index.do; *Nova Scotia Board of Censors v. McNeil*, 1975 CanLII 14 (SCC), onlineat https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2595/index.do; *Minister of Justice of Canada v. Borowski*, 1981 CanLII 34 (SCC), online at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2531/index.do ; *Downtown Eastside*, *Ibid.*

concerns with the impact of public interest litigation on directly affected persons and on scarce judicial resources. The current leading case law expresses less concern with opening the floodgates or inviting busybodies than did cases in prior decades.[11] However, the court is still conducting a balancing of policy rationales and is never required to grant public interest standing.

The relaxation of standing in the Canadian courts reflect the consistent views of law reform commissions and commentators, although it does not go as far as recommended with respect to environmental matters. The Australian law reform reports have considered the environmental regulatory context at length, including the concerns of the industry sectors concerning costs and delay.[12] However, as in Canada they have consistently concluded that fear of floodgates and busybodies are overstated due to practical barriers to litigation.[13] They have further found such fears to potentially be misdirected at public interest representatives as the most vexatious litigants are apt to be directly affected parties. Further, narrow standing may not have desired effect as it creates more legal issues for disputes.[14]

The recognition of public interest standing by the Canadian courts is often held up as an example of what administrative agencies could or should do. However, it is important to recognize that such recommendations may rely on the general concept of relaxing interest requirements so that issues may be heard where the proposed proceeding provides an appropriate means to do so. There are few court cases on the ability of administrative tribunals to grant common law public interest standing, however those that exist are fairly unreceptive to the idea in situations where legislation provides other standing tests.[15]

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[11] *Downtown Eastside*, *supra* note 15; contrast with *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 [Canadian Council], online: http://www.canlii.org/en/ca/scc/doc/1992/1992canlii116/1992canlii116.html?resultIndex=3.

[12] Australian Law Reform Commission, *supra* note 4.

[13] *Ibid*.

[14] *Ibid.*

[15] *Alberta Wilderness Association v Alberta (Environmental Appeal Board)* 2013 ABQB 44 [*Alberta Wilderness Association v. EAB*]; ; *Friends of Athabasca Environmental Association v. Public Health Advisory and Appeals Board*, [1994] 6 WWR 267; 18 Alta LR (3d) 92; 24 Admin LR (2d) 156; [1994] AJ No 296 (QL), upheld on appeal for other reasons in *Friends of Athabasca Environmental Association v. Public Health Advisory and Appeals Board* 1996 ABCA 11, online: http://www.canlii.org/en/ab/abca/doc/1996/1996abca11/1996abca11.html?autocompleteStr=friends%20of%20the%20athabasca%20&autocompletePos=1 [*Friends of Athabasca*]; see also *Gagne,v. Sharpe*, 2014 BCSC 2077 [*Gagne*] and *Gagne v. Sharpe* 2015 BCSC 154 (costs decision at para. 35) for considering jurisprudence on common law public interest standing,

Interveners and "friends of the court"

The use of interveners and "friends of the court" have received minimal attention as models for standing at regulatory agencies, yet they might actually provide more relevant comparisons than common law public interest standing.

Interveners cannot trigger hearings and do not become full parties with the ability to raise issues, challenge evidence and appeal decisions. Interveners are screened through a combination of legislated rules and the discretion of the courts, and are basically assessed by the potential of their limited submissions to assist the court in deciding the issues. There are some trends towards distinguishing private interest versus public interest interveners. Judicial receptivity towards interveners varies; however, there is empirical evidence and some judicial commentary that interveners have impact on decisions.[16]

Friends of the court, technically known as the "amicus curiae," are officials appointed by the court to provide advice or to represent issues for which there is no standing party. Friends of the court are used when the executive branch of government refers an issue to the courts for advice. This will typically be a contentious issue of public law. References will also invite interveners, and the role of the friend of the court might be to represent issues for which there are no suitable interveners. References are uncommon; however, these may be the situations where litigation most closely resembles the "forward looking" function of regulatory decision-making.

2.6 Considerations for standing at administrative tribunals

The type of energy regulatory agencies used in Alberta can be considered a subset of administrative boards and tribunals. Standing at administrative tribunals has historically received less attention than standing in the courts although this is changing quickly. This is a challenging area in which to develop consistently applicable principles of standing; however, some trends are beginning to emerge.

[16] Getting Heard: "Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada", (2010) 50 Supreme Court Law Review 1 [Getting Heard]; *Canadian Council*, *supra* note 18.

The starting point is that administrative tribunals are not courts. They are extensions of the executive branch of government whose ability to hold hearings and determine standing varies immensely. Key differences to consider include:

1. Mandates from legislation
2. Diversity of agency models
3. Hearings are not litigation
4. Rationales for and against public participation
5. Stage in a larger regulatory process

The commentary is fairly consistent that standing at administrative tribunals should be more relaxed and less formal than standing in court.[17] Such recommendations rely on an even greater range of rationales than similar recommendations concerning standing in court.

Multiple alternative models would avoid evidentiary barriers to standing, for example:

- putting the onus on the proponent that they will not do harm[18]
- allowing all persons to make submissions subject to relevance requirements and efficiency measures[19]

The most common recommendation in Alberta is to replace the directly and adversely affected tests. The most-proposed alternative is a broader "interest" requirement.[20] Some proposals emphasize the need to recognize the substantive issues suitable for determination and to grant standing so that they can be heard, again like in the courts. Fewer recommendations are for multiple tests including a directly affected test and a second category or screening tool for persons who are not directly affected. This approach is already used by many regulators in Canadian jurisdictions including in Alberta; however, this is typically done where hearings are already certain to occur. However, attempts to fit agency hearings into a larger regulatory process, concerns with process efficiency and the fact that policy may come from above can lead to narrow standing at tribunals.

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[17] ELC Report on Standing, *supra* note 1, summarizing numerous commentaries.
[18] Mark Haddock, *Environmental Tribunals in British Columbia*, (Victoria: Environmental Law Centre, 2011). Available online: http://www.elc.uvic.ca/publications/environmental-tribunals-in-bc/ [Tribunals in BC].
[19] Adam Driedzic, "Proving the right to be heard: evidentiary barriers to standing in environmental matters" (Paper presented to the Canadian Institute of Resources Law, Symposium on Environment in the Courtroom, Calgary, Alberta, March 2015). Available online: https://cirl.ca/symposium/2015-symposium. [Evidentiary barriers].
[20] See ELC Report on Standing, *supra* note ___, canvassing past recommendations for a broader interest requirement (among other factors in determining standing).

2.6.1 Mandates from legislation

Administrative tribunals have no inherent jurisdiction. All authority to hold hearings and determine standing must be found under legislation. As above, multiple cases have been unreceptive to administrative tribunals granting common law public interest standing as that specific concept is linked to the inherent jurisdiction of the courts.[21] However, this does not determine the authority and discretion of tribunals under legislation.

Authority under legislation may be expressed or implied. The legislature can definitely express a test for standing provided that this legislation itself is constitutional. Where legislation is silent, administrative tribunals have implied powers necessary to discharge their mandates and are considered masters of their own procedure. It is possible if not likely that tribunals have discretion to trigger hearings and hear from persons on issues within their jurisdiction unless prohibited from doing so. There are few, if any, cases where courts found a tribunal to exceed its jurisdiction by hearing from someone. Most cases concern application of the legislated tests.

As above, courts will usually defer to tribunals on determinations of standing involving questions of fact. However, courts will still require that legal tests be correctly articulated and that findings of fact be reasonable, and may intervene in denials of standing in order to uphold procedural fairness. There might not be any cases where a court has overturned an agency decision to grant standing as a question of fact, and there are multiple cases where grants of standing by tribunals have been upheld by the courts.[22]

Mandates from legislation have a significant impact on standing as a question of policy. Courts determining standing balance their own policy rationales, even if legislation speaks to standing. Regulatory agencies in many cases either "must" or "may" consider policy provided by statutes, regulations and executive orders. Viewing legislatively prescribed tests for standing as raising questions of "law and fact" may imply that the only relevant policy is that which has been set by the legislation. However, the

[21] *Alberta Wilderness Association*, *supra* note 22; *Gagne*, *supra* note 22.
[22] *Dawber v. Ontario (Ministry of the Environment)* [2007] OERTD No. 25; 28 CELR (3d) 281, upheld on judicial review in *Dawber v. Ontario (Director, Ministry of the Environment)* [2008], 36 CELR (3d) 191 (Ont. Div. Ct.) [*Dawber*]; *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID1 (A.E.A.B.), upheld on judicial review for other reasons in *Cardinal River Coals v. the Environmental Appeals Board and Ben Gadd*, 2004 ABQB 0403 18462

legislation can be vague, and judicial inquiry may not settle questions of administrative discretion. Tribunal directives, rules, policies, practices and latent receptivity to holding a hearing can all have an impact on determinations of standing. What direction is needed, what discretion remains, and the available locations of guidance within the legislative framework are all important questions respecting energy regulators in Alberta.

2.6.2 Diversity of boards and tribunals

Energy regulators in Alberta can be considered a subset of a diverse array of administrative boards and tribunals. There might be no one right configuration or solution to the regulatory challenges these agencies are created to address. Examples considered below include:

Panels, inquiries and consultations around policy development, regulatory development or cumulative effects. Such proceedings are not triggered by standing. The trigger will be legislative requirements, referral from the executive or the regulator's own initiative. A main purpose is information gathering so requirements for participation are likely to be minimal and roles will vary. However, there may be targeted stakeholder engagement, relevance requirements, or registration requirements.

Environmental assessment reviews. These may or may not be conducted by the industry regulator, and are not triggered by standing. The most common triggers are legislated requirements or a referral. Public participation is a purpose of environmental assessment in the examples reviewed so it could be expected to be broad; however, roles will vary. Examples below include the federal environmental assessment regime before and after the 2012 reforms, the Manitoba Clean Environment Commission, and the Alberta regime before and after creation of the AER. All current models suggest some participant screening or process controls; however, Alberta is uncharacteristically narrow in using the directly affected test.

Regulatory boards that make the original decisions on project applications. Jurisdiction to hold hearings will vary and if it exists then standing may or may not be the hearing trigger for a given application. Persons with standing are usually called "interveners" and at least those interveners that triggered the hearing will be full parties. There is a definite trend towards allowing public interest interveners and further participant roles, at least where hearings are triggered. Examples below include the AER, AUC, B.C. Utilities Commission, Ontario Energy Board, National Energy Board, B.C. Oil and Gas Commission and several Australasian examples. The Alberta energy regulators may

have stronger environmental mandates; however, standing is towards the narrow end of the range.

Appeals tribunals that hear challenges to regulatory decisions. Standing will be required to trigger hearings and the hearing format will be adversarial and quasi-judicial. The person that triggered the hearing becomes the "appellant" and a full party. The tribunal has discretion to hear from other persons known as "interveners" and to prescribe their roles. The appeals format might suggest the narrowest standing of the various tribunal models; however, there is still a broader range of interests at stake and a forward-looking element as compared to courts. Examples discussed below include the AER, the Alberta Environmental Appeals Board, B.C. Environmental Appeals Board, B.C. Oil and Gas Tribunal, and several Australasian examples. The Alberta energy and environmental models of standing are definitely towards the narrow end though not narrowest.

One regulatory agency may be charged with multiple functions. The AER is responsible for nearly all of the above functions and in that regard has the broadest mandate of nearly every example reviewed.

2.6.3 Regulatory hearings are not litigation

Regulatory processes are inherently more "forward looking" than court process as the regulator must consider future impacts and the issues allow for a broader range of reasonable conclusions.

In the majority of administrative board and tribunal hearings there is no direct legal dispute between the parties arising from past events.[23] Even in such rare instances there are further interests at stake in tribunal decisions.[24]

Rationales for (or against) standing that flow from the adversarial litigation system are less applicable at most regulatory agencies. In fact none of the sources expressly touted litigation models as positive.

Directly affected persons may have a right to a hearing under legislation or common law duties of fairness; however, they cannot be presumed to provide the most helpful facts or arguments for the nature of the decision to be made. Public interest representatives

[23] Robert MacCaulay and James Sprague, *Hearings Before Administrative Tribunals, Second Edition* (Toronto: Carswell, 2002).
[24] *Ibid.*

possessing relevant information, expertise or capacity can have much to offer to regulatory hearings regardless of the existence of directly affected persons.

Likewise, concern with harm to directly affected parties resulting from standing must be tempered by need to consider further interests. In some original project decisions the proponent may not have acquired prior resource rights, and even if so, the development approval remains a statutory consent not a right. Even in a regulatory appeal the interests of the approval holder are subject to considerations beyond the legal interests of their opponent.

One contentious rationale for restrictive standing in the litigation context that is even more contentious concerning standing at tribunals is to protect the decision of directly affected "third parties" to not seek hearings. The issue is that this rationale depends on hypothetical private parties and implied consent to direct effects. This is very unsound given the practical deterrents to seeking hearings, especially among socially or economically disadvantaged constituencies. Concerning limits on public interest standing in court, this rationale has long been criticized by commenters and is largely rejected in the leading jurisprudence. In the regulatory context, there is undoubtedly value to enabling directly affected parties to use alternative dispute resolution or otherwise settle with proponents. However, the diffuse nature of development impacts coupled with practical barriers to participation makes it practically impossible to infer universal consent among persons who do not seek hearings.

Most commentary is that regulatory proceedings should be less formal than court on the grounds that adversarial disputing often does not suit the nature of the issues. However, one of the strongest arguments for formal hearings in the regulatory context is the potential to test and weight evidence that results from use of witnesses, sworn testimony and cross examination. This is a benefit for parties with standing that "open mic" public participation or written statements of concern cannot achieve. These conflicting views may suggest that the regulatory context warrants broader standing tests yet may still receive value from some formality of hearing process.

2.6.4 Rationales for and against public participation

Standing and hearings at regulatory agencies could be considered a sub-set of "public participation" in government decision-making. While there are some similarities, many of the rationales for and against public participation in government decision-making differ from the rationales behind standing in the courts. As participation is more politicized, it is also important to consider how acceptance of the rationales for and

against public participation is influenced by views about the public participants themselves.

2.6.4.1 Rationales for public participation

The rationales for public participation have been discussed at length, including with respect to energy development in Alberta.[25] In multiple cases this includes assertions or evidence of the impact of public participation. The rationales for public participation are often classified as either improving the "substantive" or "procedural" quality of decisions.

Public participation is typically said to have a positive impact on the substantive quality of decisions, due largely to the increased information and perspectives provided to the decision-maker.[26] Some more specific impacts of participation include [paraphrased]:

- not relying just on the expertise of the regulatory body[27]
- helping to anticipate and adapt to negative outcomes[28]
- highlighting problems that have been underestimated or ignored, or that the government is ill-suited to examine[29]
- inducing more rigorous environmental assessment[30]
- helping to shape environmental issues and to express community values[31]

The "procedural" rationale is basically that public participation can enhance the legitimacy of the decision-making process.[32] By hearing from a wider range of views on a

[25] Mark S. Reed, "Stakeholder Participation for Environmental Management: A Literature Review" Biological Conservation 141 (2008), 2426 [Reed]; Barry Barton, "Underlying Concepts and Theoretical Issues in Public Participation in Resource Development," in Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources, eds. Donald Zillman, Alastair Lucas & George Pring (Oxford: Oxford University, 2002), 101 [Barton]; Benjamin Richardson & Jona Razzaque, "Public Participation in Environmental Decision-making," in Environmental Law for Sustainability, eds. Benjamin Richardson and Stepan Woods, (Oxford: Hart, 2006), 179 [Richardson]; Rebeca Macias, "Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation" Canadian Institute of Resources Law Occasional Paper, 34, (2010), 8 [Macias]; Thomas Beierle, "The quality of stakeholder-based decisions," Risk Analysis 22, (2002) 747; Samuel Brody, "Measuring the effects of stakeholder participation on the quality of local plans based on the principles of collaborative ecosystem management," Journal of Planning Education and Research, 22, (2003), 414 [Beierle]; Janette Hartz-Karp and Michael Briand, "Institutionalizing Deliberative Democracy," Australasian Parliamentary Review, Vol. 24(1), (2009), 183 [Hartz-Karp].

[26] *Ibid.*

[27] Reed, *Ibid.* at 2420.

[28] *Ibid.*

[29] Macias, *supra* note 37 at 8.; Richardson, *supra* note 37 at 166.

[30] *Ibid.*

[31] Macias, *ibid*. at 9 , Hartz-Karp, *supra* note 37 at 172.

given decision, the decision-maker is better able to meet the expectations of the public they have been mandated to serve. Some further specifics of the procedural rationale include [paraphrased]:

- enhancing the acceptability of the decision[33]
- enhancing the transparency and accountability of the decision-making process[34]
- improving trust in the government and its agencies[35]
- procedural rights have been viewed by some as either a fundamental human right or crucial to the exercise of these rights[36]

The procedural rationales for public participation may not account for opponents who have no intention of ever accepting decisions or the legitimacy of a process. This is a potential barrier to role of regulatory system in delivering "social license" for an industry and a topic warranting further study.

Some rationales for participation speak to both substantive and procedural rationales. This would include preventing capture of the regulator by the industries that it regulates.

2.6.4.2 Rationales against public participation

Rationales for limiting public participation in regulatory proceedings mostly surround efficiency and preventing harm to the regulated industries. These rationales are most valid where there are high numbers of applications or the potential for large hearings, either of which is possible with energy development in Alberta.

Efficiency is a recognized principle and legitimate goal of administrative practice, and this can extend to ensuring that unnecessary hearings are not held.[37] It should be recognized that costs and delay can impact all parties. However, there is nothing in this general efficiency principle that prescribes any specific rule on when hearings should or should not occur, or for how standing should be determined.

Administrative efficiency concerns have some precedent in the concerns of the courts about opening the "floodgates" or allowing "busybodies." These are really two separate

[32] Barton, *supra* note 37 ; Hartz-Karp, *supra* note 37 ; Richardson, *supra* note 37at 166.
[33] Barton, *ibid.* at 105; Richardson, *ibid.* at 166.
[34] Barton *ibid.* at 104; Macias, *supra* note 37 at 11.
[35] Reed, *supra* note 37at 2420; Hartz-Karp, *supra* note 37at 183.
[36] Barton, *supra* note 37_at 102.
[37] Alberta Law Reform Institute, *Report No. 79, Powers and Procedures for Administrative Tribunals in Alberta* (Edmonton: Alberta Law Reform Institute, 1999).

issues: concern with floodgates is about the decision-maker being required to hold numerous or large hearings, while concerns with busybodies are with parties that have no real stake in the issues. Floodgates and busybodies concerns are easy to combat with any model of standing other than one which grants hearing rights to any person on nearly any issue. Multiple examples of standing in other jurisdictions as well as the learnings from standing in court indicate that the floodgates and busybodies concerns are often overstated to start with.

There are further concerns with "frivolous" proceedings, meaning those without merit, or "vexatious" proceedings, meaning those intended to harm opponents. These concerns can be harder to combat as frivolous and vexatious parties can be directly affected. Rules and reforms aimed at frivolous and vexatious interveners are a feature of multiple regulatory agency models discussed below.

Most of the commentary cited in this report proposes a "balance of efficiency" whereby investment in more inclusive processes at an earlier stage reduces back-end costs. This balance of efficiency would be supported by the frequency of challenges to denials of standing. If the goal of a potential party is to cause delay or increase costs then this can be done by contesting a denial of standing just as readily as by hearing the substantive issues.

The most troubling driver of restrictive standing at regulatory agencies is avoidance of public scrutiny of decisions. This is not a recognized rationale for limiting public participation, and even if it were, it might be too politically contentious to express. However, it is evident in multiple past cases where applications of the directly affected test in Alberta prevented hearings from occurring despite real regulatory issues with decisions. Some examples include:

- expediting provincial approvals in anticipation of future federal regulations; [38]
- amending licenses despite questions of authority to make such decisions; [39]

One further case found a reasonable apprehension of bias in the application of the test to exclude specific organizations that might otherwise qualify and had qualified in the past.[40] These types of cases raise issues that could be squarely within the mandate of the regulators to determine if only standing was available. Multiple of these examples

[38] *Pembina Institute for Appropriate Development v. Alberta (Utilities Commission)* 2011 ABCA 302.
[39] *Alberta Wilderness Association*, *supra* note 22;
[40] *Pembina Institute v. Alberta (Environment and Sustainable Resource Development)* 2013, ABQB 567.

concern the environmental regulator rather than the energy regulators, however they highlight potential for latent rationales behind application of basically the same tests.

In Canadian society it is legitimate to oppose a project, to request the implementation of environmental policies through regulatory decisions, or to appeal potentially unlawful decisions. While the rules of standing have legally prevented such challenges, there is no legitimate policy rationale for doing so.

One area where evidence is lacking, at least in the public domain, concerns regulatory process costs. What are the costs incurred by holding hearings, and are these costs attributable to intervener standing?

Hearing triggers result in direct costs to all parties involved. Example costs include personnel time, technical subject matter and retention of experts and payment of intervener costs. Overall, the costs of regulatory hearings to all parties can be high even compared to litigation.

For proponents, delay must be more of a concern than decision outcome because most projects are approved. Proponents may accept that interveners have relevant information yet still oppose hearings on account of delay, which may carry some associated costs or risk of lost market access. Hearings also bring reputational risks to proponents, the broader industry, to government, and even to interveners. For proponents, even if direct hearing costs were acceptable, it would make more sense to invest these amounts into affected communities in exchange for goodwill.

The province faces reputational risk in the eyes of the industry due to lengthy or uncertain regulatory process. These concerns with deterred investment and loss of competitiveness are clearly reflected in the Regulatory Enhancement Project.

It is not clear that any of the above costs are the direct result of granting standing. The clearest case would be the direct costs incurred by triggering hearings; however, in many models hearings can be triggered by ways other than an individual's standing. The issue is more with certainty around when hearings will or will not occur.

The costs of delay appear more linked to the overall length of the decision-making process than to granting of standing in that process. Costs of delay related to project construction (rather than operations) may be mitigated by contracting practices to account for delay in regulatory approvals.

Views of public participants

Favourable or unfavourable views of participants, especially public interest representatives, can impact acceptance of broader participation. Favorable views of public participants include:

- They may have relevant information, expertise and capacity to assist substantive decisions.
- Repeat interveners may be inclined to conduct responsible proceedings.
- Interveners only intervene if they feel a chance to make a difference.
- Public interest interveners prevent interest confusion and unfair burdens on private parties.

Unfavorable views of public participants include:

- They may cause deliberate delay, flood hearings, or use proceedings to harm proponents.
- One-shot interveners have no incentive to conduct responsible proceedings.
- They may use regulatory hearings to shame proponents or governments or to leverage political stoppage of projects.
- They may raise irrelevant issues or broad policy concerns in regulatory hearings.
- They may intervene in specific project applications to draw attention to deficiencies in the regulatory system.

Public participants are very diverse and much evidence on their impacts is anecdotal. Questions on which more evidence would help include:

- How do public interest representatives compare to purely private interests?
- How do large organizations compare to local ones?
- How to groups compare to individual citizens?
- How do purely public interest organizations compare to landowners, community groups, First Nations or municipalities?
- How does technical expertise compare to local knowledge?
- How do established organizations and “professional” interveners compare to groups formed for the purpose of proceedings?
- How to outside interventions compare to government participation, appointed experts, ombudspersons, or amicus?

Likewise, there would be value to a more personal look at “regulatory culture.” What are the views of regulatory personnel towards exercising discretion, holding hearings, granting standing, and hearing from various types of interveners. What level of politicization or internal policy is in play? Are their feelings that regulators legitimately serve the industry that counter allegations of regulatory capture?

Notably, much of the evidence discussed below suggests that the main issues in Alberta are not so much with interveners or regulatory personnel as they are with the system itself.

2.6.5 Stage in resource development process

Determining the appropriate models of standing at regulatory agencies faces an additional challenge. Regulatory hearings occur within larger processes for natural resource development and environmental management. Participation regimes should fit the stage of process; however, this is challenging for several reasons. Challenges that are broadly recognized and have also been specifically identified in Alberta include:

- Resource rights are granted before land use plans or project approval decisions are made.
- Regulators struggle with vague "public interest" mandates.
- Lack of rights or opportunities to participate at stages of the resource development process (either before or after project approvals) creates pressure for project-specific regulatory hearings, and is thought to drive policy debate into regulatory hearings.
- Clear demarcation between "policy development" and "policy implementation" (i.e. regulatory) decisions can be very difficult.

Furthermore, the regulatory processes in which participation is possible are fragmented among multiple provincial agencies as well as between the federal and provincial governments. Again, this challenge is known to Alberta in multiple contexts. It is relevant to cumulative effects management and to single regulator concept that underlies the AER.

Multiple past comments on standing have highlighted the need to develop a more comprehensive public participation framework throughout the resource development process. The public interest perspective emphasizes the importance of participation in policy implementation, not just policy development.

3. Standing in other jurisdictions: how does Alberta compare?

This section of the report reviews standing in other provinces as well as some other countries with similar legal systems and natural resource industries. The goal is to include those agencies that carry out the most similar functions to the AER and AUC. Examples covered include:

- The Ontario Energy Board and the Ontario Environmental Review Tribunal
- Multiple British Columbia agencies including the B.C. Oil and Gas Commission, Oil and Gas Appeals Tribunal, B.C. Utilities Commission, and the B.C. Environmental Appeals Board
- The Manitoba Clean Environment Commission
- The federal environmental assessment regime including project reviews by the National Energy Board
- Various examples from New Zealand and Australia

One finding of this review is to affirm that there might be no single right answer to how regulatory agencies should be configured or the model of standing to be used. Nonetheless there are some trends. We've compared and contrasted the jurisdiction with our findings of Alberta's regulatory context (discussed in later sections).

Like Alberta:

- Reforms to energy regulatory process have occurred or are underway in multiple other jurisdictions.
- Standing is rolled in with other regulatory efficiency concerns, many of which may be larger.
- The practical ability to obtain standing and the impact of the resulting participation is linked to other process elements like notice of applications and decisions, intervener costs or participant funding, and the rules for making submissions.

In contrast to Alberta:

- All other jurisdictions featured different standing tests and participation regimes for different types of agencies, rather than using similar tests for all agencies like in Alberta.

- Legislated participation in the environmental (rather than energy) regulatory system is broader in most other jurisdictions.
- Legislated participation in energy regulatory decisions varies; however, it may be narrower than participation in environmental regulatory decisions where those systems remain separate.
- Some other jurisdictions provide more formalized participation opportunities at other stages of process such as minerals policy development, land use planning and development of regulations.
- Legislated participation opportunities are typically broadest at earlier stages in the process and become narrower at later stages, rather than using similar tests for multiple stages like in Alberta.
- In multiple examples, hearings are trigged by means other than standing, such as legislated requirement, the discretion of the regulator, or referral by the executive.
- Utilities regulation may generally be more favorable to discretionary standing and public interest interveners; however, many utilities regulators have less environmental mandate than in Alberta.
- Oil and gas regulation tends to be more landowner-focused respecting rights to hearings.

One feature seen in Alberta and at multiple other Canadian regulators is two separate tests for standing. The legislation or the regulator's rules of practice will recognize both persons who are directly affected, and persons who have sufficient interest, information or expertise. However, these two category models appear to contemplate situations where hearings are triggered by means other than standing and are already set to occur.

Overall, Alberta provides one of the most consistently restrictive models of standing across all streams and stages of energy, environment and natural resource regulation. On the other hand, Alberta shows some potential to find middle ground as it provides neither the most absolutely restrictive nor the most open models of standing. Alberta may also be ahead on providing energy and utilities regulators with environmental mandates, despite the challenges in defining those mandates. Thus, the main issue in Alberta as compared to other jurisdictions remains the potential misfit between the mandates of the regulators and the model of standing.

One particular value to comparing jurisdictions is to increase the available evidence on the practical impacts of models of standing. These findings closely resemble the findings about standing in court despite the different legal rules and policy rationales in play at tribunals.

Issues with restrictive standing are very consistent between jurisdictions. This includes not hearing issues suitable for determination, concerns with access to justice and legitimate process. The comparisons affirm that narrow standing may not serve regulatory efficiency to the extent believed. Most regulatory interventions, and especially the most vexatious interventions, are brought by private interests. Likewise, most appeals are brought by the developers, followed by landowners and perhaps First Nations. As these appellants are the types most likely to be directly affected, implementing narrow standing may simply create more issues of dispute.

Issues with broad standing are quite inconsistent. Most of the negative impacts on efficiency and industry interests appear to occur where standing is completely open. Even so this is not a universal outcome, and it may result from aggravating factors. Examples include open standing on appeals, process management challenges created by large numbers of minor participants (rather than the true standing parties), or vexatious interventions by private interests making use of broad standing. In multiple jurisdictions, broad standing has not opened the floodgates at all.

Evidence of the positive impacts of participation on substantive decisions on procedural legitimacy is more anecdotal and harder to quantify. However there is some qualitative evidence from multiple jurisdictions indicating that participation improves decisions and that public interest organizations in particular have made positive contributions.

3.1 Ontario

Like Alberta, Ontario is a larger province in terms of population and geography, has multiple natural resource industries, and has a regulatory system that makes use of multiple boards and tribunals to hold public hearings. Examined here are the Ontario Energy Board and the Ontario Environmental Review Tribunal. Both agencies grant standing to persons who are not directly affected, offer multiple types of participant roles, and have experienced recent changes relevant to standing. The policy context in Ontario at the time of research involved the promotion of renewable energy.

3.1.1 Ontario Energy Board

The Ontario Energy Board (OEB) is mandated by the *Ontario Energy Board Act, 1998 (OEB Act)* to regulate the electricity and natural gas sectors; however, its mandate

differs respecting these two industries.[41] Natural gas applications trigger a broad public interest mandate to consider environmental, economic and community impacts. Electricity applications do not trigger OEB authority to review environmental issues as this remains a function of the environmental regulator. However, the OEB's mandate in the electricity context includes consideration of consumers and this is favorable to public interest representations.

The OEB describes itself as an "adjudicative tribunal," states that it engages in a "balancing of interests" on applications, that its hearings provide a forum for individuals or groups of individuals who may be affected by decisions, and that public participation ensures informed decisions.[42] Legislated requirements to hold hearings on types of approval decisions is feature of both the gas and electricity regimes. The *OEB Act* provides a baseline requirement to hold a hearing and give notice to persons prior to making orders.[43] However, it also provides that no hearing is required if no person requests a hearing after notice, no person other than the applicant will be "adversely affected in a material way by the outcome" and the applicant consents to proceeding with no hearing.[44] The Act further provides more specific situations where hearings must or must not be held following board directives.

The *OEB Act* provides the OEB with discretion on the form of hearings, as well as authority to dismiss proceedings without hearings if proceedings are frivolous, vexations, in bad faith, or relate to matters outside of the OEB's jurisdiction, or if statutory requirements for bringing proceedings are not met.

As with the energy regulators in Alberta and B.C., the OEB has authority to makes its own rules of practice and procedure.[45] The rules maintain the discretion provided by the Act regarding proceeding format. They further specify authority to require settlement conferences and pre-hearing conferences. The rules provide an intervener framework that is more relaxed than Alberta's concerning the interest requirements for standing but more formalized concerning roles and expectations on interveners. The rules

[41] *Ontario Energy Board Act, 1998*, SO 1998, c.15, Sch B. [*OEB Act*]
[42] Ontario Energy Board, http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Hearings/Participating+in+a+Hearing
[43] *OEB Act,* supra note 56,s. 21.
[44] *Ibid.*
[45]Ontario Energy Board Rules of Practice and Procedure, available online: http://www.ontarioenergyboard.ca/oeb/_Documents/Regulatory/OEB_Rules_of_Practice_and_Procedure.pdf [OEB Rules].

provide multiple ways to participate, much like the B.C. Utility Commission rules (discussed below). Persons may:

- register to follow a proceeding and receive documents,
- submit a letter of comment, or
- become an intervener.

The rules state that persons seeking intervener status must show a "substantial interest" and intend to participate "actively and responsibly" by submitting evidence, argument or interrogatories or by cross examining a witness.[46]

Intervener filings must state the nature of the interest and indicate how persons may be affected and the scope of intended participation. The rules also require "frequent interveners" to make annual filings that are posted on the board website. These annual filings help the OEB determine the basis for the interest of the frequent intervener in particular proceedings. Additional information sought of groups include the groups' mandate and objectives, membership if any, constituency represented, types of programs or activities carried out, and the identity of authorized representatives.

The OEB states that "intervenors may include customers and other affected individuals, consumer and trade associations, environmental and regional interest groups, and other public interest groups." The frequent intervener filings are almost all by public interest organizations and go beyond the environment into housing, building, infrastructure, industry professionals and consumer interests.[47]

Notably, the OEB's approach to groups and organizations resembles how the courts look to the objectives or activities of organizations as indicators of "genuine interest." The approach does not require that groups have members that may be directly affected, although that is one factor indicating interest.

OEB decisions imply a liberal approach to the substantial interest test if there are if no objections to particular interveners. Objecting to intervener applications is a right under the rules of practice. The rules further allow the board to grant intervener status on the conditions that it deems appropriate; however, they do define interveners as "parties" to the proceeding and imply a substantial role.[48]

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[46] *Ibid.*

[47] Ontario Energy Board Frequent Intervener Filings, available online: http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Applications+Before+the+Board/Annual+Filings+-+Frequent+Intervenors

[48] OEB Rules, *supra* note 61.

Like the AER regime, the *OEB Act* allows a person that "is" directly affected by an OEB order to seek appeal to the OEB.[49] The right to appeal does not apply to persons who did not make submissions on the original decision after being given notice of opportunity to do so. The *OEB Act* limits standing to trigger appeals in this way; however, it expressly provides discretion to add parties if appeals are triggered. As in Alberta and most jurisdictions reviewed, the *OEB Act* limits appeals to court to questions of law or jurisdiction.[50]

The participation regime provided by the *OEB Act* goes beyond hearings and appeals on regulatory decisions. In the electricity context it provides requirements to establish stakeholder input into policies and processes concerning consumer interests and advocacy.[51] In the natural gas context it requires notice and opportunity to comment on proposed rules.[52]

The OEB also carries out public consultations on development of policies, rules and official positions through its own initiative or when requested by government. One recent OEB initiative of this nature included a review of the OEB's framework for the participation of interveners in regulatory applications, policy consultations and other proceedings. The OEB's findings recognized the importance of interveners, but took the view that the contributions of interveners would be better understood and managed by providing greater accountability and expectations on interveners.[53] This initiative has resulted in changes to the OEB rules including several of the intervener filing requirements discussed above.[54] The changes also increased roles for OEB staff in adjudicative proceedings as exemplified by the use of settlement conferences. Notably, much of the review concerned intervener cost rules rather than intervener standing.

The most extensive public consultation ever undertaken by the OEB followed a request by the provincial energy minister to consult with Ontarians on the proposed Energy East

[49] *OEB Act*, *supra* note 56 , s.7.
[50] *Ibid*. s.33
[51] *Ibid*. s. 4.4 and 4.4.1.
[52] *Ibid*. s.45(3).
[53]Ontario Energy Board, Consultation to Review the Framework Governing the Participation of Interveners in Board Proceedings (EB-2013-0301)
http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Policy+Initiatives+and+Consultations/Framework+Governing+Participation+of+Intervenors
[54] Ontario Energy Board, *Re. Review of the Framework Governing the Participation of Interveners – Completion of First Phase* (April 24, 2013), available online: http://www.ontarioenergyboard.ca/oeb/_Documents/EB-2013-0301/ltr_Intervenor_Participation_First_Phase_20140424.pdf

pipeline.[55] The purpose of this request was to help the provincial government formulate a position on this project before participating in National Energy Board hearings. The terms of reference included environmental impacts and as a result of consultations, the OEB expanded the issues to include climate change and greenhouse gas emissions.

The *OEB Act* and how it is interpreted by the OEB suggests many of the same tensions that exist in Alberta's energy regulatory regime. Examples include:

- Use of hearings for adjudication of private disputes despite recognized merit to a broader range of participation to inform public interest decisions.
- Only requiring hearings where there are directly affected persons, despite implied discretion to trigger hearings without such persons.
- Receptivity to public interest interveners if hearings are triggered; however, no legislated means for public interest interveners to trigger hearings.
- Legislation providing more guidance on dismissing hearings and denying standing than on when to hold hearings or grant standing.
- The importance of board rules to determining scope and process of public participation.
- Potential for formal participation opportunities and regulatory proceedings other than project-specific hearings.

3.1.2 Ontario Environmental Review Tribunal

The Ontario Environmental Review Tribunal (ERT) has a similar substantive mandate to environmental appeals boards in Alberta and B.C. , but with fairly unique rules for standing. Legislation couples relaxed interest requirements for standing with stringent requirements for the substantive issues on which appeals may be heard. Two such examples from the ERT are relevant to energy regulators in Alberta. One is allowance for "third-party" appeals of environmental approvals provided by an Environmental Bill of Rights. The second is environmental legislation that allows any member of the provincial public to file appeals against green energy project approvals. In either example, if hearings are triggered then the tribunal recognizes three categories of participant roles: "parties," "participants" and "presenters." As in most models, only "parties" have the full range of rights to raise issues, bring motions, and cross-examine witnesses.

[55] Ontario Energy Board News Release, "Giving Ontarians a Voice on Energy East" (Aug 13-2015) http://www.ontarioenergyboard.ca/OEB/Industry/Media+Room/News+Releases/News+Releases+in+2015#20150601

Third-party appeals

Provision for third-party appeals under the Ontario Environmental Bill of Rights is one of the best documented regimes in Canada concerning its practical effect. It is also currently under review. It provides an important comparison for the AER given that appeals to the AER replace appeals to the Alberta Environmental Appeals Board.

The Ontario Environmental Bill of Rights sits separately from the substantive environmental management legislation. It provides for several procedural rights, one of which is third-party appeals to prescribed types of ministry decisions. Screening third-party appeals involves a two-step process: standing and leave to appeal. The test for standing requires an "interest in the decision" and that "another party" would have a right to appeal. This interest requirement is fairly relaxed, and has been met by private interests, municipalities and environmental organizations representing public interests. Showing that "another party" would have a right to appeal is fairly easy as legislation provides approval holders with a right of appeal. Leave to appeal is more restrictive. Third parties have a 15-day period to file appeals that the tribunal is prohibited from extending. The tribunal must refuse appeals unless there is good reason to believe that a decision was unreasonable and that the decision could result in "significant environmental harm." Both branches of this test — unreasonableness and significant harm — must be met. The tribunal is then faces a deadline to issue a decision on leave. The courts have characterized the leave requirements as "stringent" and as creating a presumption against leave. However there is one notable case in which the courts upheld a tribunal decision to grant leave under this test.[56]

There are allegations that it remains very difficult to obtain leave to appeal, and this is supported by the numbers.[57] During the first ten years of the legislation there were 14,000 ministry decisions of which only 54 were subject to leave-to-appeal applications, of which only 13 were granted in whole or in part.[58] More recent data affirms this trend that leave is only granted in around 20 to 21% of applications.[59]

[56] *Dawber*, *supra* note 33.
[57] Application for Review Re. Environmental Bill of Rights, (December 21, 2010) [archived at Canadian Environmental Law Association]. [EBR review application]; Richard Lindgren, "Third Party Appeals Under the Environmental Bill of Rights in the Post-Lafarge Era: The Public Interest Perspective", (Presentation to the Ontario Bar Association, February 2, 2009) [Archived at Canadian Environmental Law Association], [Third Party Appeals].
[58] EBR Review Application , *ibid.*
[59] *Ibid.*

Most requests for appeals are not by third parties. Annual reports of the tribunal from 2009–2012 show around 180–250 requests for tribunal hearings a year, of which only 12–27 are made under the Environmental Bill of Rights.[60] The implication is that roughly 90% of requests for appeals are brought by either the approval holders or other persons who would have standing under the approvals legislation. This finding that public interest representatives are not the main source of demand for appeals is consistent with findings from other jurisdictions discussed below. Overall, the legislation has allowed some third-party appeals while definitely maintaining limits on this prospect. There is no evidence that third-party appeals have created much tribunal inefficiency or harms to directly affected parties.

The Environmental Bill of Rights is under review and one of the identified issues is the leave to appeal component of the two-step approach.[61] Some background and recommendations on this issue are provided by the submissions of the Canadian Environmental Law Association.[62] The legislation originated in part to ensure access to justice and the soundness of decisions, so third-party appeal is arguably one of its most important features. However the effectiveness of this feature is hampered by the leave to appeal process. This includes the short timeframe for filing, the substantive test for leave to appeal, and difficulty for the tribunal in meeting its deadline for decision. These provisions are preventing access to the tribunal even if a leave application concerns environmentally significant activities that require the types of decisions for which appeals are available. The Canadian Environmental Law Association notes that the original task force on development of the legislation suggested a preliminary merit screening for third-party appeals; however, it reached no consensus on the wording and the draft of the legislation contained no leave test at all. Accordingly it recommends deletion of the leave test. The test for standing would remain, and the tribunal as master of its own procedure would still have authority to dismiss appeals that are frivolous, vexatious or concern matters outside of its jurisdiction without holding a hearing.

[60] Environment and Land Tribunals Ontario, Annual Reports, online: http://www.ert.gov.on.ca/english/publications/index.htm

[61] Government of Ontario, Review of Environmental Bill of Rights (Environmental Registry No. 012-8002), available online: https://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTI4OTky&statusId=MTk1MTYw

[62] Richard Lindgren and Theresa McClenaghan, “Ensuring Access to Environmental Justice: How to Strengthen Ontario’s Environmental Bill of Rights” (Canadian Environmental Law Association, 2016), available online: http://www.cela.ca/collections/justice/ontarios-environmental-bill-rights-ebr

The Ontario Environmental Bill of Rights raises another consideration for Alberta around substitution of process. The legislation creates an exception to third-party appeal rights (and further participation rights) in specific cases where activities are approved under provincial environmental assessment legislation. The rationale is that the environmental assessment legislation provides for public participation. However, the public participation regime for environmental assessment has since been reduced such that this assumption is no longer valid.

Renewable energy appeals

The Ontario *Environmental Protection Act* allows any person resident in Ontario to file an appeal with the tribunal against a renewable energy approval.[63] However, the only substantive grounds for a hearing are that engaging in the renewable energy project according to the approval "will cause serious harm to human health; or serious and irreversible harm to plant life, animal life or the natural environment."[64]The notice of appeal must include descriptions of how the project would cause such harms, a statement of issues, and material facts the Appellant will present. If the required grounds are not made out then the tribunal is required to uphold the approval decision.

The tribunal guidance document for public participation in green energy appeals outlines expectations on the public to comply with procedure.[65] This includes the decision deadlines on the tribunal and an expedited approach to this type of appeal. All hearings and preliminary hearing dates are "peremptory" to all parties, participants and presenters. This means that people who are provided notice and do not attend are not entitled to any further notice, can be inferred to have accepted material facts and may face a decision in their absence.[66]

Persons other than the appellant wishing to become parties, participants or presenters must file a request stating their issues and material facts relevant to the subject matter; their relevant contributions to the substantive issues; whether their interests may be directly and substantially affected; and whether they have a genuine interest (public or private) in the subject matter of the proceeding.

[63] *Environmental Protection Act*, R.S.O. 1990, ch E.19, s.142.1 (1) and (2).
[64] *Ibid.* s. 142.1 (3).
[65] Ontario Environmental Review Tribunal, Guide to Appeals by Members of the Public regarding Renewable Energy Approvals under s. 142.1 of the Environmental Protection Act, (2010) available online: http://elto.gov.on.ca/ert/guides-rules/ [Renewable Energy Appeals Guide].
[66] *Ibid*.

The provision for renewable energy appeals is a fairly recent development that occurred in a context of provincial support for renewable energy. Many appeals have been brought against wind power projects by an array of landowner, community, municipal and environmental organizations, and there are anecdotal concerns about repeat appellants. It can be implied from the tone of the tribunal guidelines that allowing any person to file appeals or to intervene in such appeals can create challenges with managing the process and keeping to the relevant issues.

3.2 British Columbia

B.C. has a vast array of administrative boards and tribunals with environment, energy and natural resource functions. Discussed here are the B.C. Utilities Commission, Oil and Gas Commission, Oil and Gas Tribunal, and the Environmental Appeals Board.

A key difference from Alberta is that standing in B.C. varies significantly between tribunals and sometimes between different matters at the same tribunal. British Columbia most resembles Alberta in that multiple tribunals are prescribed standing tests that preference private rights. Multiple examples are even narrower than Alberta's directly affected test.

A thorough review of tribunals in British Columbia was conducted by the Environmental Law Centre based at the University of Victoria (the B.C. ELC report). This report recommended that standing rules should be "consistent and fair," noting that the rules varied widely and that many instances clearly excluded persons that may be affected by decisions.[67]

The B.C. ELC report also finds issues with lack of clear environmental mandate on the part of the energy and utilities regulators. Notably, it speaks favorably of Alberta legislation for providing equivalent industry regulators with mandates to determine the public interest with regard to environmental, social and economic factors on project applications. This finding was made prior to the creation of the AER however it remains relevant.

3.2.1 B.C. Utilities Commission (BCUC)

B.C. Utilities Commission (BCUC) resembles the Alberta Utilities Commission in being an independent agency with a mandate to regulate electric and natural gas utilities.

[67] Tribunals in BC, *supra* note 28.

Legislation establishing the BCUC defines a "public hearing" as “a hearing of which public notice is given, which is open to the public, and at which any person whom the commission determines to have an interest in the matter may be heard.”[68] Much like Alberta and other provinces, the British Columbia *Utilities Commission Act* (British Columbia *UC Act*) provides the BCUC with broad jurisdiction to hear matters arising through applications.[69] The commission has jurisdiction to reconsider decisions and if it was a decision on which a hearing was held then there must be a hearing on the reconsideration.[70]

Unlike Alberta, the British Columbia *UC Act* requires hearings on specified matters including the outlay or loss of public utilities, rather than just where procedural duties towards affected persons exist.[71] The Actis not very prescriptive on standing at all. The B.C. ELC report states that this regime “grants the BCUC broad discretion to determine who has public interest standing before it.[72] Traditionally, it has granted standing to broad types of ratepayers, but also to environmental non-government organizations.”[73] On the other hand, it is not clear that hearings may be triggered by standing.

Where hearings occur, the BCUC’s Rules of Practice and Procedure provide for multiple participant roles.[74] Persons may:

- Register as an “interested party” to receive documents and evidence from proceedings.
- Write a “letter of comment” to form part of the evidentiary record, understanding that letters may not be given the same weight as evidence that is tested through hearings.
- Become an “intervener” and actively participate in the hearing.

Interveners must demonstrate that they are either “directly or sufficiently affected” or that they have “information, experience and expertise” relevant to the matter that would contribute to decision-making. The scope of an intervener’s participation is determined by BCUC based on nature of interest and issues raised.

[68] *Utilities Commission Act*, RSBC 1996, c 473.
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] Tribunals in BC, *supra* note 28.
[73] *Ibid.*
[74] British Columbia Utilities Commission Rules of Practice and Procedure, available online: http://www.bcuc.com/RegisterIndex.aspx [BCUC Rules]

3.2.2 B.C. Oil and Gas Commission

The B.C. Oil and Gas Commission makes the original decisions on oil and gas project approvals.[75] It oversees formalized stakeholder engagement programs, consultations that are required to be carried outby proponents according to regulations, and it invites stakeholders to submit written concerns stating how they may be affected by a proposed project.[76] However, hearings do not appear to be contemplated by the legislation or part of the current commission process on original decisions. Prior to recent reforms, the relevant legislation allowed any "interested person" to apply to the Oil and Gas Commission or an advisory committee for alternative dispute resolution regarding regulatory approvals. According to the B.C. ELC report, this rule allowed broad access to dispute resolution and reconsideration of authorizations by the commission.[77] However, this broad access to the commission was repealed and replaced with narrower standing provisions that provide for appeals of commission decisions to the Oil and Gas Appeals Tribunal. [78]

3.2.3 B.C. Oil and Gas Appeals Tribunal

The B.C. Oil and Gas Appeals Tribunal hears appeals from decisions of the Oil and Gas Commission.[79] Legislation limits standing to permit applicants, permit holders, landowners of the land where oil and gas activity is permitted, persons subject to orders and persons found in contravention of the legislation.[80]The Oil and Gas Appeals Tribunal rules allow for interveners to be added to appeals; however, only the above persons listed in the legislation have standing to trigger appeals. To be eligible to appeal, persons must have been parties to the original decisions and have not applied for review by the Commission at the time they are filing for appeal.[81]

Surface owners where projects are located may only appeal on the basis that the Commission did not give due regard to the surface owner's submissions or to written reports on the consultations that were carried out.[82] This restriction of standing to

[75] *Oil and Gas Activities Act*, SBC 2008, c.36, Part 3 – Oil and Gas Activities, Division 1 - Permits. [BC *Oil and Gas Activities Act*].
[76] *Ibid*,.
[77] Tribunals in BC, *supra* note 28.
[78] Tribunals in BC, *supra* note 28.
[79] BC *Oil and Gas Activities Act*, *supra* note 92, s.19 and s.71, and generally Part 6 – Reviews and Appeals.
[80] *Ibid*. s.69(1).
[81] *Ibid*. s.72.
[82] *Ibid*.

prescribed categories of rights holders, further subject to procedural circumstances and limited grounds for appeal can be considered narrow by any standard. It is one of the few examples narrower than Alberta's directly and adversely affected test.

3.2.4 B.C. Environmental Appeals Board

B.C. Environmental Appeals Board (BC EAB) has a similar substantive mandate to the Alberta Environmental Appeals Board in that it hears appeals to regulatory decisions under the main water,environment statutes, and climate change emissions statutes. This is an important comparison for the AER given that the AER has taken on such functions. The BC EAB also hears appeals under wildlife legislation and the industrial emissions control regime, which are not reviewed in this report as they are less analogous to the functions of the energy regulators in Alberta.

Unlike Alberta, B.C.'s water and environment statutes contain two different standing tests. Standing to trigger water appeals is limited to prescribed classes of rights holders[83] Like the B.C. Oil and Gas Tribunal, this approach is narrower than Alberta's directly affected test. Standing to trigger environmental appeals requires that a person be "aggrieved."[84] This is like Alberta's directly affected test in being a semantic variation of the historic common law tests. The B.C. ELC report may imply that the "aggrieved" test is interpreted more broadly so as to hear from persons that are impacted by decisions. However, it also states that it "would be considered a narrow rule in many jurisdictions." The B.C. Environmental Appeals Board has been subject to recent litigation concerning denials of standing to community and environmental representatives.[85] While the court accepted the legislature's test for standing, it overturned the denial of standing based on concerns with fairness and overly high evidentiary barriers. The BC EAB has since issued an Information Sheet on standing that provides interpretations of "aggrieved" that consider the provincial and historic case law.[86] This interpretation maintains need for evidence of prejudice to the interests of a person or individual. However it does not require that a legal right is or may be adversely affected.

[83] *Water Sustainability Act*, SBC 2015, Ch 15, s.105(1).
[84] *Environmental Management Act,* SBC 2003, Ch 53, s.100(1).
[85] Gagne, *supra* note 30.
[86] British Columbia Environmental Appeals Board, Standing to Appeal under the Environmental Management Act, available online: http://www.eab.gov.bc.ca/fileAppeal/information_sheets.htm

Like Alberta, the B.C. Environmental Appeals Board is more open to interveners once hearings are triggered; however, interveners are discretionary and may have restricted roles.

Concerning appeals, the B.C. ELC report did not advocate for open standing where any person could appeal any decision on any issue. It was felt that there was need for appellants to show that they were affected so as to sharpen the issues between parties. However, "this is not to suggest that only private interests warrant standing or that public interest groups should not be able to bring appeals related to public resources."[87] The report also recommended that triggers for appeals should be impact-based rather than rights-based.

3.3 Manitoba

The Manitoba Clean Environment Commission is significant as public participation is a core purpose of the agency itself rather than just being a purpose of the legislation or a given regulatory process. The commission is established under the Environment Act (1988) which provides the agency with an expressed mandate of "developing and maintaining public participation in environmental matters." The commission states that it exists to "provide an avenue through which the public can participate in the decision-making process regarding the environment in Manitoba." Holding public hearings is one of the commission's most notable functions. The commission can hold public hearings on environmental assessments and major project reviews, and on policy development.

The commission provides an important comparison for Alberta energy (and environmental) regulators as multiple matters considered by the commission concern major energy projects, including hydro generation, electric transmission lines and regional cumulative effects assessment. The commission is not a regulatory decision-maker and instead submits reports and recommendations to the government. The hearing archive implies roughly one large and lengthy hearing a year, with roughly one corresponding panel report per year.

Hearings are not required by legislation or triggered by standing. Hearings occur when the responsible Minister requests the commission to convene a hearing. For environmental assessments, the process allows members of the public to submit

[87] Tribunals in BC, *supra* note 28.

comments, and in response to concerns raised the Minister may request the Commission to hold a hearing.

The legislation does not provide any test for standing. The commission issues a very comprehensive Process Guidelines Respecting Public Hearings which provides the procedural rules as well as softer advice and expectations for participants.

The guidelines generally commit to providing any member of the public with a fair opportunity to make a case. However, they also show significant attention to structure, process control, and maintaining the relevance of submissions. The guidelines state that all public hearings will be structured but still as informal as possible. They also provide for public meetings, which are less formal than hearings.

Like other agencies discussed in this section, the commission recognizes multiple levels of participation. Persons may:

- attend informal public meetings,
- make written submissions,
- become a presenter, or
- become a full "participant" at hearings.

Participants are described as "public groups" that may act as the "opposition" in hearings involving a project proponent. Participants have rights to make written submissions and presentations, call witnesses, question proponents, be questioned and make final arguments. The guidelines also emphasize the responsibilities of participants to be "highly committed and engaged" in the entire hearing process. Participants are expected to provide research and analysis, expert opinion and findings. Participants must adhere to procedure and are asked to co-operate with each other and keep abreast of the proceedings so as to avoid duplication of questions or submissions.

Persons seeking to become participants must apply at the beginning of the process and be approved. Applications for participant status must state why status should be granted and outline the information or assistance the applicant may provide to the commission. In screening participants the panel "will" consider:

- The degree to which the applicant's interests may be directly and substantially affected.
- The relevance of the proposed submission to the mandate of the hearing.
- The significance of the applicant's commitment to the entire hearing.
- Whether or not applicant is likely to make a useful and distinctive contribution to the panel's understanding of the issues.

Persons that pass the participant screening become "parties" to the proceeding on conditions the commission considers appropriate.

Persons that are unsuccessful in attaining participant status will be given alternative opportunities that suit their needs and capabilities and the needs of the panel. "Presenters" are also considered "parties" to the proceeding, however with fewer rights. Presenters have a time slot to present and can request information; however, they cannot make motions or question witnesses. Members of the public without official presenter status can also receive opportunities to be heard in designated parts of the proceeding.

Regardless of a person's role, the panel may exclude evidence for irrelevance, unreliability, confusion of the issues, prejudice to other parties or repetition of evidence that was already presented.

Participant funding is available through a test prescribed by regulations. Again, this resembles the old federal regime where funding was more prescribed than standing and acted as a practical determinant of participation. Factors to consider in determining funding include:

- Demonstrated interests in the potential effects of the development.
- A group's established record of concern or demonstrated commitment to the interests that it represents.
- Whether the representation would assist the panel and contribute substantially to a hearing.
- Whether the applicant has attempted to bring related interests into an umbrella group.

These factors resemble the factors used by the courts to determine "genuine interest" coupled with the procedural and substantive considerations regarding public participation in regulatory process.

In many ways the Manitoba regime resembles the federal environmental assessment regime prior to 2012. The legislation makes public participation a purpose, provides no standing test, makes the funding test a form of practical screening device, and leaves it to the responsible agency to manage process. On the other hand, the Manitoba Rules and Guidelines are some of the most developed respecting the management of participants with an eye to substantive contributions and process efficiency.

3.4 Federal environmental assessments and the National Energy Board

The federal environmental review process has been subject to ongoing contentions around public participation. It provides an important comparison for Alberta given the subjects of most federal or joint federal-provincial hearings are large energy and natural resource projects.

Public participation has long been an expressed purpose of federal environmental assessment legislation. This goes beyond hearings on major projects to include submissions and consultations on lower levels of environmental assessment. Hearings are triggered by the nature of the project or by government referral of the matter to a hearing rather than by standing.

Prior to 2012 the legislation provided no test for standing and federal hearings were open to the public as a matter of practice. This included hearings held by the National Energy Board and the Canadian Nuclear Safety Commission. There were also cases of joint federal-provincial review panels allowing broader participation than might have occurred if Alberta alone held hearings and applied its "directly affected" test. Federal legislation provides a test for participant funding requiring that persons add value to the process and that they fit one of several interest-based categories, and this has had practical impact who will be involved participants in federal reviews.

There is qualitative evidence that public participation in federal environmental assessment under the old regime has had positive impact on decisions.[88] Impacts include the reflection of public concerns and ideas in panel deliberations and recommendations, as well as examples of proponents changing or improving their project plans. This particular study concluded that panel reviews provide a preferred process to exchange ideas about how and whether a project should be allowed.[89]

The old federal environmental assessment regime may also provide evidence of efficiency benefits from holding public review panels, since failure to incorporate public consultations into environmental assessment has costs. Multiple court cases on federal

[88] Susan Rutherford and Karen Campbell, "Time Well Spent? A Survey of Public Participation in Federal Environmental Assessment Panels"(2004) 15 JELP 69
[89] *Ibid.*

environmental assessment process concern inadequate public participation.[90] This is yet another example of late stage disputes resulting from avoidance of earlier stage participation.

There are reports of positives outcomes from public participation in National Energy Board process. The ELC Summit on Standing discussed the NEB review of offshore drilling in the Arctic.[91] This review visited multiple communities in the region, holding a multi-day roundtable in the Arctic with roughly 200 people. This was said to allow parties to listen to each other with respect and sincerity, and resulted in clear expectations for drilling. Another example is consultations conducted by the NEB into the issue of hearing accessibility, which resulted in the NEB establishing a new Process Advisor role to assist participants.[92] It is also fair to say that participants have had success in getting many conditions imposed on approvals.

Public interest interveners have also not been the parties pushing most disputes over National Energy Board decisions into the courts. The annual report of the NEB leading into the 2012 reforms indicated that the majority of appeals of NEB decisions around that time were by directly affected parties including landowners, other surface rights advocates, First Nations and industry.[93] This reflects similar findings in other jurisdictions.

One repeat criticism of the old federal review process has been of the "free-for-all" atmosphere that it created, especially where the federal energy regulators conducted the environmental assessment review in conjunction with the regulatory approval hearing.[94] This criticism intensified around the Northern Gateway pipeline hearings in 2012-2013, which spanned many days and involved thousands of participants in what became a publicized battle. Perhaps more so than any previous regulatory proceeding, these hearings fueled politicized debate over the merits of public participation and environmental organizations. Some issues, not specific to any one side of this debate, included:

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[90] *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2007 FC 955; *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C.R 229.

[91] Karla Reesor and David Hill, Workshop Summary Report, Environmental Law Centre Summit on Standing and Public Participation (Environmental Law Centre, 2014), [unpublished, archived at Environmental Law Centre] [ELC Summit on Standing].

[92] *Ibid.*

[93] National Energy Board, Annual Report To Parliament, 2011 [archived at National Energy Board].

[94] ELC Report on Standing, *supra* note 1, referencing published criticisms of Enbridge Northern Gateway Pipeline hearings.

- Debate over whether or not the categories of participant funding should restrict the nature of substantive submissions.
- Participant concern with practical barriers including procedural hoops and formal atmosphere.
- Industry concern with deliberate hearing flooding and creation of delay.
- Use of project-specific regulatory hearings to raise broad policy concerns like global climate change (for which there was no official forum).
- Concern with the conduct of participants and further opponents outside of the hearing process (which cannot be resolved by restrictive standing as that would only fuel criticisms).
- Little satisfaction from participants with the substantive outcome or feelings that the process was legitimate.

Debate over the Northern Gateway Pipeline hearings largely missed the crucial distinction between standing for public interest representatives and questions of public participation more broadly.

Of the numerous full parties to the Northern Gateway pipeline hearings, environmental organizations comprised only 7.5% as compared to 18% for industry and much larger percentages for First Nations and directly affected individuals.[95] Many of the concerns with efficiency and harm to industry exemplified by Northern Gateway Pipeline hearings relate more to the process management challenges created by large hearings involving numerous non-standing participants.

Public participation definitely impacted the substantive decision as it included a large number of conditions on the approval. In this case it is likely that standing was a factor.

Some fair conclusions on the federal review process prior to 2012 may be that:

- Open standing raises efficiency concerns and requires significant process management.
- Public participation may not be the leading efficiency concern.
- Public participation does improve decisions with little risk that it will stop a project.
- Full standing for at least some public interest representatives is warranted where relevant to the issues.

[95] *Ibid*, referencing List of Parties to Enbridge Northern Gateway Pipeline hearings.

The 2012 reforms are often cited for restricting standing under the *Canadian Environmental Assessment* Act (2012). The act continues to have an expressed purpose of providing public participation and to invite comments from the general public as part of baseline for environmental assessment process.[96] However, if the decision-maker is the National Energy Board, the Canadian Nuclear Safety Commission or a review panel then participation is limited to an "interested party."[97] An interested party is either a person who is "directly affected" or one that has "relevant information and expertise." The effect of these provisions is inconclusive as decision-makers have varied in how they have applied them. Two of the first decisions on standing under the CEAA 2012 regime are often cited as taking different approaches. The New Prosperity Mine Review Panel issued a ruling on intervener status that applied principles developed by the courts for common law public interest standing. It found that the public law contexts and the "important public interests reflected in the stated purposes of the act" warranted a "liberal and generous approach" to determining intervener status. In contrast, the Jackpine Mine Review Panel made decisions on standing through application forms and then again through a legal ruling on certain parties as requested by the proponent. The legal ruling relied on the Joint Panel Agreement and the legislation for the test to use, and then the Terms of Reference for the review to determine the relevance of information and expertise.

Overall, implementation of the legislative reforms appears to have a restrictive effect on public participation where the agency is the National Energy Board. There is some criticism that the new tests are being applied in applications to submit letters of comment on projects, not just to be afforded standing at hearings. There are also accounts of persons passing the tests yet not being able to exercise significant roles on account of hearing format and process.

Standing and public participation were not the only or even the main efficiency concerns for the 2012 reforms. The Parliamentary Committee made 20 reform recommendations of which 17 might be said to concern efficiency; most of these did not concern public participation.[98] Some industry-side recommendations barely mention standing at all, showing more concern with redundant or uncertain process, long agency

[96] *Canadian Environmental Assessment Act*, 2012, SC 2012, c.19, s.52.
[97] *Ibid,* s.2(2), s.19(1), s.28.
[98] ELC Report on Standing, *supra* note 1, discussing Parliamentary Review of Canadian Environmental Assessment Act prior to 2012 reforms.

timelines, lack of clarity regarding Aboriginal consultations, and general bureaucratic inefficiency.[99]

The federal environmental regulatory regime is again under review at this time. The review includes both the environmental assessment regime and the National Energy Board. Public participation is a topic of both reviews and more legislative changes might be anticipated concerning participation in regulatory hearings.

3.5 New Zealand and Australia

New Zealand and Australia provide apt comparisons for Alberta. Both are common law countries with minerals industries. Both have a similar legal framework to Alberta where most minerals are owned by the Crown, the minerals title is separate from the surface title, there is a two-stage process of leasing and project permitting, and the project stage may involve multiple regulatory authorities.

There are also notable differences in the general participation frameworks. In multiple examples below:

- More legislated hearing opportunities come through environmental assessment, land use planning or policy development processes.
- Submissions or standing in earlier stages of the regulatory process may carry forward to later stages.
- The institutional configuration involves less use of independent, industry-specific regulatory boards.
- The institutional configuration makes greater use of specialized environmental courts and appeals tribunals to hear challenges to ministry decisions.

The environmental courts provide notable evidence that broad standing and public interest representation are not the main source of inefficiency. One review of Australia as a whole reported 125 cases brought under open standing provisions in 15 years (roughly 8 cases a year). Only 31% of these cases under open standing were brought by public interest advocates.

3.5.1 New Zealand

The main onshore industries include non-energy minerals mining and agriculture. The country is notable for minerals legislation that provides that any person may make

[99] *Ibid.*

submissions on "Crown minerals programmes."[100] The purpose of the minerals programs is to set policies and procedures for matters including allocation of mineral rights and setting of royalties.[101]

Participation in regulatory approvals is determined by resource management legislation that applies to multiple industries.[102] There are multiple "tiers" of approval decisions that offer corresponding participation opportunities. [103]The responsibility falls on decision-makers to determine the eligible participants and provide the appropriate type of notice of the application:

- A non-notified activity means no notice or submissions on the application.
- A limited notice activity means that affected persons receive notice directly and may make submissions.
- A publicly notified activity means that any person may make submissions, with the exception of trade competitors of the applicant whose submissions would serve that purpose.

The tier to which an activity is assigned is based on factors such as the environmental impact, significance of the development, or type of land where the development occurs.

Hearings are mandatory for any submitters or for permit applicants who request a hearing. Otherwise council has discretion on whether or not to hold hearings, conferences or mediation, as well as discretion on who may participate and be heard.[104] Public hearings are typically held on publicly notified activities.

Any person who made a submission on the original decision or persons whose interest in the proceedings are greater than that of the public generally can appeal the decision

[100] *Crown Minerals Act 1991* (NZ), http://www.legislation.govt.nz/act/public/1991/0070/latest/whole.html

[101] New Zealand Crown Minerals Programmes, available online: http://www.nzpam.govt.nz/cms/our-industry/rules-regulations

[102] *Resource Management Act 1991* (NZ), [NZ RMA] http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html

[103] *Ibid,* especially s.95 and 95A to 95F, s.308A and 308B, s.99, s.99A and s.100*;* Ministry for the Environment, "Getting in on the Act", http://www.mfe.govt.nz/publications/rma/everyday/overview/index.html ; New Zealand Ministry for the Environment Getting Involved in the Resource Consent Process, http://www.mfe.govt.nz/rma/public/consent-say/index.html [NZ Government Guides].

[104] NZ RMA, *Ibid*.

to the Environment Court.[105] Appeals from the environment court to the general court system are limited to questions of law.[106]

Some third party commentary suggests that broad standing on regulatory approvals has not caused excessive interventions: "There is no sense that councils or the Environment Court are flooded with frivolous objectors."[107] On the contrary, people are welcome to object to projects as long as they have submissions or evidence that assists the decision-maker to deal with the issues.[108]

The public participation provisions in the legislation were reformed in 2009, which is after the date of the above comments. This suggests few issues. The government overview of the amendments cites at least two process issues behind the reforms. One is with use of process that makes no worthwhile contributions. The strongest concerns of this nature were directed at frivolous and vexations interventions brought by trade competitors of the applicants.[109] Accordingly,the rights to hearings and to participate in appeals under current legislation are not available to trade competitors who would use regulatory process for trade competition purposes.[110] The second expressed issue was with delay caused by agency challenges in interpreting complex notice provisions that were being repealed.[111] The overview makes no expressed reference to issues with environmental or public interest interveners. Overall, these reforms suggest that the legislation itself was as much a source of inefficiency as the interveners, and that private interest interveners created more issues than public interest interveners.

3.5.2 Australia

Australia has a federal system in which states have constitutional status and significant regulatory authority over natural resources. The established minerals industry is coal and the emerging onshore petroleum industry is unconventional gas. This review included the Australian states of Queensland, New South Wales and Victoria, although Western Australia is also important to such comparisons. In all of these states, relevant legislation has either been recently amended or reviewed, or such changes are

[105] *Ibid.,* s.274.

[106] *Ibid*., s.149V.

[107] Barton, *supra* note 37.

[108] *Ibid*.

[109] ELC Report on Standing, *supra* note 37, discussing regulatory reforms in New Zealand.

[110] NZ RMA, *supra* note 122; NZ Government Guides, *supra* note 122.

[111] ELC Report on Standing, *supra* note 1, discussing regulatory reforms in New Zealand.

anticipated. Recurring themes include improving the approvals system, defining participation, and political concern with social license for the industry.

Multiple Australian examples feature the traditional model of projects requiring separate environment and energy approvals. In some cases a third approval under planning legislation may be required.

However, there some examples of substitution of responsibility or consolidation of function that provide comparisons for the Alberta Energy Regulator. The state of Victoria allows energy ministry approvals to substitute for environmental ministry approvals as discussed below Western Australia, though not reviewed in depth, keeps environmental assessment and permitting with the environment ministry but provides authority over "vegetation clearing" to the energy ministry.[112]

Some general trends in all of the Australian states reviewed include:

- The main route to hearings on approval decisions and appeals was through environmental legislation administered by environment ministries.
- Energy legislation provided some limited opportunities to comment on projects, but did not provide for hearings to the same extent as in Alberta.
- The submission of comments on original decisions was usually a prerequisite for participation in hearings on original decisions and rights to file administrative appeals.
- Regulators often had discretion to hold hearings, informal conferences and meetings.
- Appeals to court were typically restricted to questions of law, like in Alberta.

Overall, these systems bear resemblance to Alberta in the general progression of submissions and hearings. However, they differ significantly from Alberta in the breadth of participation and hearing opportunities provided through the land and environment (rather than energy) regulators.

Queensland

In Queensland, the environmental legislation provides for public participation on a level (i.e. a class) of approvals that would pose high hazards, cause pollution of specific

[112] Government of Western Australia "Natural Gas from Shale and Tight Rocks: overview of Western Australian's regulatory framework" (Department of Mines and Petroleum, 2014), http://www.dmp.wa.gov.au/Documents/Petroleum/PD-SBD-NST-102D.pdf

types or effects on environmentally significant areas.[113] Notice of such activities is the responsibility of the proponent and must state that anyone may make a submission.[114] Decision-makers must accept properly made submissions and may accept submissions that were not properly made.[115] Decision-makers may hold a conference and invite submitters, and must consider any views expressed at the conference.[116] A "dissatisfied person" may apply for review of the original decision and such reviews may be appealed to the land court. Only persons who made submissions may initiate or participate in appeals. The court practice is to provide participants with a choice of roles ranging from written submissions only to full party status. The Queensland system is the product of regulatory reforms and departmental restructurings over the past decade that are somewhat opposite of the Alberta Energy Regulator in that previously consolidated authority was split into an environmental protection department and a natural resource department.[117] This reform period coincided roughly with some political recognition of need to restore social license for the unconventional gas industry.[118]

New South Wales

In New South Wales, the environmental legislation requires public notice of applications for significant developments and written notice to landowners and occupiers on the parcel or adjacent parcels whose use and enjoyment of land may be detrimentally affected.[119] Any person may make a written submission; however, hearing rights depend on the type of review. If an application is reviewed by a review panel then the panel has discretion to hear from interested persons. If an application is reviewed by the Planning and Assessment Commission then the commission must meet with interested persons and it may hold a public meeting; however, it is not required to hold hearings. In practice the commission will hold a hearing on applications that it deems to

[113] *Environmental Protection Act 1994* (Qld). EPA (Qld), Section 18(c); Chapter 5A, 309D and 309I; http://www.legislation.qld.gov.au/legisltn/current/e/envprota94.pdf ; Government of Queensland, "Information Sheet, Chapter 5A Activities", Department of Environment and Resource Management . http://www.ehp.qld.gov.au/register/p01561aa.pdf.

[114] *Ibid.*

[115] *Ibid.*

[116] *Ibid.*

[117] Changes to the Department, Queensland Government, http://www.derm.qld.gov.au/

[118] Queensland Cabinet and Ministerial Directory, Government of Queensland Government, http://www.cabinet.qld.gov.au/ministers.aspx.

[119] *Environmental Planning and Assessment Act 1979* (NSW), especially s.79 http://www.austlii.edu.au/au/legis/nsw/consol_act/epaaa1979389/ ; Planning Assessment Commission, Procedures for Decision Making (31 August 2011), available online:

be "controversial" based on its own factors, which include the number of objections, objections by the local council (local authority), or political donations connected with the application. Nonetheless, the New South Wales systems for public participation in approvals under environmental legislation and under minerals legislation have been subject to criticism from the Environmental Defender's office.[120] It claims that despite public participation being recognized by legislation there is in practice little ability for communities objecting to a project to influence the approval decision.

Persons who made submissions on some types of approval decisions have a right to appeal approvals to the Land and Environment Court. The Land and Environment Court of New South Wales is notable in its own right for operating under legislation that provides broad standing on many matters. The court notes that concerns with opening the floodgates to busybodies have proven false:

> "Doom-laden forecasts that open standing would swamp the Court with unworthy litigation have proven false. Most litigation by environmental activists has been discerning, and has often made a significant contribution to the jurisprudence of the court."[121]

The court hears roughly 2000 cases a year of which only around 7 are brought under open standing provisions. Most appeals are brought by developers that were refused approvals. The court's clearance rate exceeds 100% meaning that matters are resolved faster than new appeals are registered.[122]

Victoria

In Victoria, activities requiring public notice under environmental legislation allow "any person or body interested in the application" to make written submissions and to

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[120] Environmental Defender's Office (New South Wales), Discussion Paper, "Mining Law in New South Wales", available online: http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf.

[121] Peter Biscoe, "Land and Environment Court of New South Wales: Jurisdiction, Structure and Civil Practice and Procedure" (Paper presented to the Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, Australia, 2 September 2010,); For further judicial statements on the courts success with efficiency, see Chief Justice Brian Preston, "Operating an environment court: the experience of the Land and Environment Court of New South Wales" (Paper presented to Renewing Environmental Law: A Conference for Public Interest Environmental Law Practitioners, Vancouver, 3 February 2011) [Operating and Environment Court].

[122] Preston, *Ibid.*

request notice if the approval is issued.[123] If comments are received then the regulator has discretion to hold a conference and invite any or all "interested parties" to attend.[124]If a conference is held then the regulator must take account of the discussions, resolutions, and recommendations that result. The practice is to consider all comments and convene a conference that all interested people may attend. A "person whose interests are affected" by the approval decision has a right to apply to review to an Administrative Appeals Tribunal. The grounds for review (administrative appeal) are limited by legislation to whether the discharges into the environment under the approval:

- will unreasonably or adversely affect the person's interests
- would cause pollution or an environmental hazard
- are inconsistent with a state environmental protection policy.

In Victoria, approvals under minerals legislation may be substituted for approvals under environmental legislation. If this route is taken the public participation provisions in the environmental legislation do not apply; there are no equivalent provisions for hearings and appeals in minerals legislation. The Environmental Defender's Office reports negative outcomes from this substitution system including disenfranchisement of communities affected by mineral projects; lack of transparent environmental review; and confusion about where in the approvals system the environment will be considered.[125] It recommends that minerals legislation require notice to persons in the area of projects and rights of appeal for persons who filed objections. The Victoria minerals regime does require proponents to consult with interested people and organizations, to report to the regulator on this activity, and to consult the community through the period of license.[126]

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[123] *Environmental Protection Act 1970* (Vic), especially s.19B-20B, http://www.austlii.edu.au/au/legis/vic/consol_act/epa1970284/ [EPA]; Victoria Environmental Protection Authority, "Licenses and Approvals", http://www.epa.vic.gov.au/our-work/licences-and-approvals/public-participation/commenting-on-applications

[124] EPA, *Ibid*., s.33B(2); Appealing a license or works approval, EPA Victoria, http://www.epa.vic.gov.au/our-work/licences-and-approvals/public-participation/appeal-process

[125] Environmental Defender's Office (Victoria), Reforming Mining Law in Victoria (2012), http://www.edovic.org.au/downloads/files/EDO_Reforming-Mining-Law-in-Victoria.pdf

[126] *Ibid.*

Victoria legislation also provides for participation in planning permits under the environment and planning legislation.[127] This legislation requires notice to adjoining landowners or "any other person" the regulator considers that the permit will cause 'material detriment' to. Any person who "may be affected" may object to applications; however, objections may be rejected if made primarily to secure an advantage to the objector. If the application is granted then any person who objected may appeal to the Administrative Appeals Tribunal subject to any exceptions to appeals in legislation.

The Victoria model is an important comparison for the Alberta Energy Regulator. Alberta energy legislation offers some comparable participation provisions to the Victoria environmental legislation and goes farther in allowing hearings on original decisions. On the other hand, Alberta environmental legislation restricts participation to persons that may be directly affected in the same manner as the Victoria minerals legislation, so a systemic barrier is already in place. It should also be noted that the approach to energy regulation in Alberta has raised concerns that the consultations required of companies do not proxy for direct participation in regulatory hearings as they provide no access to decision-makers.[128]

[127] *Environmental Protection Act 1970* (Vic), s.19-24 *, available online:* http://www.austlii.edu.au/au/legis/vic/consol_act/epa1970284/

[128] CIRL Conference, *supra* note 1.

4. Trends with standing in Alberta

Recent decades in Alberta have seen a growth in issues around standing and public participation at most if not all of the provincial agencies with functions related to energy, environment and natural resources. This section reviews the established trends, divergences and state of knowledge on which to base assessment of the current approaches at the AUC and AER.

The configuration of energy regulators in Alberta has changed multiple times, with the effect of expanding or contracting substantive mandates. The original agency of the type considered in this report was an Energy Resources Conservation Board (ERCB). This evolved into an Energy and Utilities Board (EUB), which then split into the AUC, responsible for electric and natural gas utilities, and a new ERCB responsible for oil, gas, coal and oilsands.

In 2012, legislative reforms created the AER and terminated the ERCB. The AER takes over the functions of the former ERCB and also performs functions of the environment and public lands regulators in cases of oil, gas, and coal development. The concept is of a "single regulator" for the hydrocarbon extraction industries. The mandate of the AUC remains unaffected.

Longstanding systemic issues are of particular importance for the AER due to questions around difference from the ERCB. Accordingly, this section includes more content on the ERCB and defers much of the content on the AUC to discussion of the current regime.

Another issue for the AER is that the reforms may have relied on assumptions that rules for standing on water, environment and public lands matters were sound to begin with. This section identifies where similar issues around standing exist in those regulatory spheres as well.

4.1 Applying energy regulatory mandates

There are multiple longstanding questions around energy regulatory mandates that have direct implications for standing. Some examples for this publication include the nature of "public interest" decision-making, how to consider "cumulative effects," and responsibility for public health.

Public interest

Prior to creation of the AER in 2012, there were three provincial agencies with comparable "public interest" mandates to determine if projects were in the public interest with regards to their economic, social and environmental effects:

- The AUC
- The former Energy Resources Conservation Board (ERCB), responsible for oil, gas, oilsands and coal regulation now done by the AER
- The Natural Resources Conservation Board (NRCB), responsible for reviewing non-energy natural resource projects

These agencies, and especially the former ERCB, have not elaborated much on this mandate or how it guides decisions on project applications. The ERCB was most apt to state a balancing of risks and benefits, and there are extremely few cases where projects were not in the public interest due to environmental risks. The Alberta Court of Appeal (ABCA) has had multiple opportunities to consider the public interest mandate; however, it has not added much substantive analysis. One recent ABCA decision on the AUC describes the mandate as allowing consideration of a broad range of social, environmental and economic factors, and this supported the AUC's approval decision.[129]

There are longstanding concerns about the vagueness and lack of substantive guidance for decisions that these mandates provide(d). This includes suggestion that the mandates can be used to justify decisions after the fact.[130]

Debate over the scope of the regulator's mandate was strongest concerning the ERCB and this relates to the nature of energy development process. In particular, the "two step" mineral leasing and project approval model, still in place under the AER, fueled uncertainty concerning the scope of the regulator's mandate to determine whether or not projects are in the public interest. The legislation mandating the former ERCB and now the AER also has more of a development focus than that mandating other agencies.

A narrow view of the mandate would be that projects that comply with regulations are in the public interest. This would favour limiting hearings to technical questions and narrow participation. A broad view of the mandate would allow the regulator to deny projects or impose conditions that go beyond regulatory baseline on the basis of broader concerns. This would suggest broader participation.

[129] *Berger v. Alberta (Utilities Commission)* 2015 ABCA 153.

[130] Jodie Hierlmeier, "The Public Interest: can it provide guidance for the ERCB and NRCB?", (2008) 18 JELP 279.

Viewing mere compliance with regulations as sufficient consideration of environmental and social impacts, and concluding that a project is in the public interest, is a particular issue because many conventional energy projects are exempt from environmental impact assessments. Potentially, this may mean the specifics of a project are not scrutinized for environmental or social considerations, with a higher weight on the details provided by the project proponent. In these situations, reviews through regulatory processes, such as hearings, provide opportunity to examine issues that may otherwise be missed, and with less concern about duplicative process or overlapping mandates.

The AER model removes reference to "public interest" in the legislation although it provides for analogous itemized considerations. Uncertainty over the scope of mandates continues, more for the AER than the AUC, and this remains relevant to public participation.

Cumulative effects

Alberta regulators have long been challenged with demands to consider cumulative effects under a model that has historically only offered project-specific hearings. The current provincial intention is to manage cumulative effects under regional plans under the *Alberta Land Stewardship Act*, which can require all decision-makers to comply. However such plans do not exist for much of the province, and the cumulative effects frameworks that have been created under such plans have yet to provide clear limits on impacts or strong direction to regulators.

Cumulative effects has significant relevance to standing in several ways:

- Acknowledging cumulative effects might offer a lower bar for standing than potential participants having to establish direct effects, given the often cumulative nature of impacts.
- Cumulative effects concerns may be diverted into regional planning, which has not proven ready to fill this regulatory gap.
- Regulators may offer new types of processes, which in turn may warrant new forms of standing reflective of cumulative effects issues.

All matters are discussed below.

Health

Health concerns are frequently raised in request for standing and have proven contentious in several aspects:

- Lack of substantive environmental rights in the larger legal regime.

- Evidentiary challenges in establishing potential health issues, as environmental health concerns often involve cumulative effects and impacts may not be tied back to a specific approval.
- Challenges in defining energy regulatory mandates with regards to health. Health considerations are not expressed in legislation to the extent of environment and social considerations; however, energy regulation is aimed at mitigating health risks. Although Alberta Health and Alberta Health Services are the health regulators of the province, these bodies lack authority for the regulation of energy development that may contribute to impacts to health, so this crucially remains a function for the energy regulators.
- Potential health impacts from newer types of development, which may not be as well understood and regulated as more conventional development.

Health is a concerning issue because multiple barriers to standing overlap with multiple potential gaps in the regulatory system. It is a complex issue.

4.2 Historical approach to standing

Concerning the legal rules for standing, many of the historic trends relevant to the energy regulators apply equally to the full spectrum of provincial agencies charged with land, environment and natural resource functions. Every provincial agency of this nature operates under legislation that provides some semantic variation of the historic common law approach to standing, requiring that persons must or "may" be "directly" and/or "adversely" affected. Legislated directly affected tests also apply to submissions of statements of concern on environmental assessments, environmental approvals, water licenses and approvals, and (since creation of the AER) energy approvals issued by the AER. Where legislation, rules of practice or agency policies provide additional guidance on screening participation, these are more apt to provide reasons why participation "must" or "may" be dismissed than reasons why participation should be allowed (especially in the case of the AER).

The directly affected tests have historically been applied by the agencies as the only test for standing to trigger a hearing, even where legislation implies discretion to trigger hearings through other means.

Overall, the approach to standing in Alberta closely resembles the historic common law rules in that:

- Standing is based on an individual's interests being adversely affected.
- No one besides the government may trigger proceedings in the public interest

- There are no requirements for government to trigger proceedings, or to make representations if hearings occur.

Standing in regulatory process in Alberta may be more restrictive than standing in court because the courts diverge from these baseline rules and grant public interest standing in order to hear specific issues.

Energy regulators in Alberta operate under an established jurisprudence on the topic of standing that is separate from the jurisprudence concerning standing at the environmental regulators.[131] Nonetheless, the general trends are similar. Passing the directly affected test has historically been treated as creating a right to a hearing, with no other test provided to enable considerations of public interest.

The legislation mandating the AUC and the former ERCB provided that these regulators may initiate proceedings on their own motions, however the legislation has not been applied by agencies to trigger hearings in the absence of directly and adversely affected persons.[132]

The jurisprudence mostly just considers the ability of persons to pass the legislated standing test and not the authority of the regulators to trigger hearings in other situations, so there is no conclusive authority on that topic.

These public interest provisions still apply to the AUC; however, the public interest provision was specifically removed for the AER when it was created. Legislation mandating the AER perpetuates the directly and adversely affected tests, but provides no clarity on any rights to a hearing.

On questions of law and jurisdiction, appeals of decisions by the AUC, AER and the former ERCB are all to the Alberta Court of Appeal. This has produced many appeal decisions concerning standing and other participation issues.

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[131] *Whitefish Lake First Nation* v. Alberta (Energy and Utilities Board) 2004 ABCA 49 [Whitefish]; *Dene Tha' First Nation v. Alberta* (Energy and Utilities Board) 2005 ABCA 68, leave to appeal to SCC dismissed, 2005 [Dene Tha]; *Sawyer v. Alberta (Energy and Utilities Board)* 2007 ABCA 297 [Sawyer]; *Prince v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA. 2014; *Kelly v. Alberta (Energy Resources Conservation Board),* 2009 ABCA 349 [Kelly #1]; *Kelly v. Alberta (Energy Resources Conservation Board),* 2011 ABCA 325, [Kelly 2]; among other cases.

[132] *Alberta Utilities Commission Act*, R.S. 2007, c A-37.2 s, s.8(2); *Energy Resources Conservation Act*, RSA 2000, c E-10 [Repealed], s.26(1).

4.2.1 Trends articulating and applying standing tests

As above, tribunal determinations of standing are commonly characterized as involving questions of law and fact, with less regard to underlying policy concerns. In the foundational case concerning the directly affected test under energy regulatory legislation*, Dene Tha First Nation v. Alberta*, the ABCA held that the test has two branches:

- The first branch is legal. It asks "whether the claim, right or interest being asserted by the person is one known to the law."
- The second branch is factual. It asks whether [the regulator] has information which shows that the application before it may directly and adversely affect those interests or rights.[133]

On the whole, the energy regulators typically require demonstrable harms to very specific and legally salient interests such as property rights, plus impacts on these legal interests that can be causally connected to the proposed project with specific evidence. Private property rights plus demonstrated harm to economic interests caused by the project may be practical necessities to obtain standing in many cases.

Questions of law

The first branch of the test requiring that the asserted interest be "known to law" is significant. This is a narrow interpretation of the eligible interests that is not clearly required by the words of the test. It may also not be required by court cases on standing at other agencies using similar tests.

This interpretation requires that most claims for standing be grounded in legal rights such as private property rights or Aboriginal rights. Even private health interests may not qualify without being grounded in property ownership. Conversely, it is an easy test to meet for anyone with legal rights, such as another holder of natural resource rights.

Questions of fact

The second branch of the test — the need for facts showing that the rights or interests are directly and adversely affected — has been the main issue in many regulatory decisions on standing. This is consistent with the experience with all similar tests and it is perhaps the main challenge to the functionality of these tests for environmental issues. Tellingly, comments of persons experienced with seeking standing at Alberta

[133] Dene Tha, *supra* note 157.

regulators are often less concerned about the semantic articulation of standing tests and more about the way that these tests are applied in practice.

As above, there are several evidentiary issues to consider including:

- onus of proof
- what must be proven
- standard of proof
- determining standing as a preliminary matter.

The onus of proof

The onus of proof in Alberta has historically been on the person seeking standing. This is often legally uncontentious although not always. There is also one case where the ABCA rejected the ERCB's view that the onus of proof always stays on the person seeking standing and instead adopted the approach articulated by the Supreme Court of Canada in tort litigation.[134] In that context the onus of proof is usually on the plaintiff, however if the subject matter of the allegations is within the particular knowledge of one party then that party may need to prove it.

Both the AUC and the AER may show some relaxation of this onus of proof through more overt reliance on geographic proximity as an indicator of standing. Such a presumption is both laudable and problematic. On one hand, it can create some certainty so as to prevent disputes and save resources. On the other hand, persons not meeting the prerequisite may face increased evidentiary barriers.

Another practice resembling a presumption of standing is the practice of accepting statements of concern unless the regulator is asked by someone (likely the development proponent) to reject the statement. The Alberta Environment Ministry has informally stated intentions to follow this practice on occasion, however there is no formal policy of this nature.

As a question of policy, placing the onus on persons seeking standing at all times certainly adds barriers to standing and it may not help efficiency in large proceedings.

What must be proven

What must be proven is the largest question created by the directly affected tests. Concerning facts to go on, the Court in *Dene Tha* held that:

[134]Kelly #1, *supra* note 157.

> "some degree of location or connection between the work proposed and the right asserted is reasonable. What degree is a question for [the regulator]."

Thus there is need to see some connection and assess the degree of that connection. Even though regulators and the courts have shown preference for impacts on property and economic interests, there must be some evidence of impacts. The ABCA has upheld denial of standing by the AUC to landowners who did not establish reduction in property value due to proximity to projects.[135] These are the exact same challenges that plagued application of the historic common law standing tests.

Recurrent challenges in the current energy regulatory regime that are discussed in detail include:

- preference for geographic proximity to establish connection
- need for specificity of effects
- difficulty of establishing direct connection of proposed project to health effects and/or cumulative effects, especially in preliminary stages

Overall, what must be proven to meet the directly and adversely affected test could exceed the evidence required to support a party's submissions on the substantive issues. For example, if a party's issue on appeal is with the legality of an approval decision then determination of this issue may not be fact-heavy.

The standard of proof

The standard of proof is another longstanding issue in Alberta. The courts and the agencies ostensibly recognize that the standard of proof for determining standing is lower than that needed to determine the substantive claims. This is usually articulated as only needing to show a "prima facie" case. The standard of proof can be influenced by the semantic articulation of the test, such as a requirement to show that a person "may" be affected instead of showing that a person "is" directly affected. This low standard is a good fit with determining standing as a preliminary matter where the rules of evidence do not apply. On the other hand, the courts affirm that some proof of direct and adverse effects is required.

In practice the regulators and especially the former ERCB show evidence of applying high standards.

[135] *Cheyne v. Alberta (Utilities Commission),* 2009 ABCA 348 [Cheyne].

Even if a person is only required to show that they "may" be directly affected, this demonstration may require a fairly precise description of the person's concern and evidence of a connection between that concern and the proposed project.

The standard of proof is a significant issue concerning health effects. Past practices by ERCB have come close to requiring proof of causation of individual health conditions.[136] This more closely resembles the standards imposed to determine civil litigation claims than those appropriate to standing in regulatory matters.[137] To establish direct and adverse effects on health a person must invest significant resources into a preliminary submission before even knowing if they will be granted a hearing. This must be done before deadlines have lapsed which further creates barriers to marshalling sufficient evidence.

Preliminary matter

Standing at all Alberta agencies is typically determined as a preliminary matter. This is good practice; however, it is challenging due to the evidentiary demands of the directly affected tests. There may be at least one court case in Alberta involving a determination of standing after hearing the issues; this may reinforce the value of preliminary determinations.[138] There are also issues discussed below with denials of standing at a very late stage before hearings, which again supports the practice of preliminary determinations.

The manner of preliminary determinations creates some challenge to assessing historic practice.

The ERCB almost always determined standing on paper submissions with the decision conveyed in a letter to the parties that is not made publicly available. In its history, the ERCB may have only held one notable hearing on standing that produced a public decision document. It resulted in numerous municipal, community and landowner representatives being denied standing on a gas well application.[139] This report did not review the format of historic AUC decisions. Use of public decision documents concerning standing is a current trend discussed below.

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[136] Evidentiary Barriers, *supra* note 30.

[137] *Ibid.*

[138] *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456

[139] *Decision on Requests for Consideration of Standing, Re. Compton Petroleum Corporation* (2004) EUB Decision 2006-052. [Compton Petroleum].

Questions of policy

None of the statutes prescribing the directly affected tests clearly articulate the policy rationales behind these tests. The tests may be the most disharmonious with the *Environmental Protection and Enhancement Act*, as the purpose section of the legislation includes statements on public participation.[140] While the energy legislation has historically provided more of a mandate for development and no public participation purpose, prior to the Regulatory Enhancement Project, the legislations lacked clear policy statements that linked standing to the mandate of the regulator or to efficiency concerns.

4.2.2 Judicial consideration of standing at the energy regulators

The distinction between questions of law and fact is important to how the ABCA will treat the regulator's decision on standing. To begin, appeals are only available on questions of "law or jurisdiction".

Even within the confines of these questions of law and jurisdiction, the court will also apply different standards of review depending on the issues. It has found that statements of the standing tests must be correct. For example, the ABCA has rejected interpretations of the standing test as requiring that a person show that a potential effect on them to a different or greater degree than the general public.[141] However, if a question of law involves the regulator's knowledge and expertise then the regulator's decision must only be "reasonable".[142]

The ABCA will defer to the regulators on questions of fact provided that the findings of fact are reasonable.[143] This deference extends to "mixed" questions of law and fact.

It is worth asking if the early ABCA cases may have featured bad facts on which to articulate universally applicable principles of the directly affected test. Both *Dene Tha,* in which the court articulated the "two part test," and Whitefish Lake, in which it articulated mere need for a "prima facie" case, involved First Nations asserting treaty rights over territories outside of their reserves. As Aboriginal Rights existed there was no great need for the court to search for interests or to consider that requiring a legal interest might not always be appropriate. The only real need was for evidence of

[140] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s.2

[141] Kelly #1, *supra* note 157.

[142] *Ibid.*

[143] Kelly #2, *supra* note 157

impacts by the project on the interest, which was likely a challenge to show. The outcome of both cases was for the ABCA to uphold denials of standing despite articulating what superficially appeared to be low evidentiary requirements. As the ABCA tends to defere to regulators on questions of fact, this could embolden regulators to deny standing despite the existence of some evidence.

Beginning around 2009 a trio of cases featuring the ERCB, known as the *Kelly* cases, showed greater judicial propensity to intervene into the regulator's decisions. The cases featured roughly the same landowners challenging multiple applications for sour gas wells. The context involved modelling of airborne health risks forming the basis of different zoning for consultations and for emergency measures. In the first *Kelly* case (*Kelly #1*) the court ordered the ERCB to grant standing and hold a hearing.[144] In doing so, it rejected the ERCB's legal articulation of the test as requiring persons to be differently affected from the general public, and it further relied on the fact that the person was in the strongest risk and consultation zone.

The ERCB subsequently changed its risk modelling in a manner that excluded the landowner from the same risk zone. In the second *Kelly* case (Kelly #2), the ABCA showed concern with the ERCB's evidentiary standards. It further took issue with the ERCB's characterization of evacuation risks as not adverse on account of evacuation being a benefit. Most notably, the Court stated:

> "The right to intervene … is designed to allow those with legitimate concerns to have input into the licensing of oil and gas wells that will have a recognizable impact on their rights, while screening out those who have only a generic interest in resource development (but no 'right' that is engaged), and true 'busybodies' …that balancing is the responsibility of the Board, provided that it is done on a proper legal foundation."[145]

The third *Kelly* case is the costs decision from the hearing held as a result of the first case. However it is relevant to standing as it delves into the rationale for hearings. The legislated test for costs was stated and applied more narrowly than the test for standing as requiring that an interest in land be directly affected.[146] In finding that the interveners were eligible for costs, the ABCA stated that:

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[144] Kelly #1, *supra* note 157.

[145] *Ibid.* at p.26.

[146] *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 [Kelly Costs].

> "The requirement for public hearings is to allow those "directly and adversely affected" a forum within which they can put forward their interests and air their concerns. In today's Alberta it is accepted that citizens have a right to provide input on public decisions that will affect their rights."[147]

The ABCA in the Kelly costs case further articulated a view that regulatory interventions are not purely win-lose, and that an adversarial approach is not necessarily consistent with public interest decision-making.

The Kelly cases are important going forward for numerous reasons. As a whole these cases:

- provided standing in the challenging context of health risks and possible cumulative effects.
- affirm the standing test, the focus on rights and general deference of factual questions to the regulator.
- provide some insight into the former regulator's latent unreceptivity to triggering hearings, at least on conventional projects.
- show increasing judicial attention to the policy rationales behind granting standing and holding hearings

4.2.3 Discretionary participants

If hearings are triggered then the relevant agencies recognize discretion to add participants and have variable propensity to do so. However, the energy regulators were historically provided with less guidance on screening and assigning roles to discretionary participants compared to the Environmental Appeals Board, where the rules of practice provide for "interveners." Despite lacking a test, the ERCB has previously referred to discretionary participants as "interested parties" and favored those with "relevant information."[148] These determinations were made at prehearing meetings setting the issues and participant roles. The interested parties most apt to be provided significant roles might have been those with economic interests or those that more closely resembled directly affected persons.

When adding participants, multiple Alberta agencies may show a preference for local knowledge and community groups over public interest organizations.

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[147] *Ibid.* at p.33.

[148] Re. BA Energy Inc., Prehearing Meeting (2004) EUB Decision 2004-2010. [BA Energy]; Compton Petroleum, supra note 167.

4.2.4 Receptivity to hearings

In 2014, the Environmental Law Centre Report on standing found that over time the ERCB was less likely to hold hearings, despite increasing numbers of approvals by the regulator. For example, in 1984-1985 there were 78 hearings.[149] The ELC found that these early hearings were "quite fulsome in that they included numerous environmental advocates ranging from local groups to large organizations and other government agencies making substantive representations."[150] In contrast, by 2010 (after the EUB was separated into the AUC and the ERCB), the ERCB was very unlikely to grant standing or hold a hearing, averaging only 10-12 a year.

Without settling issues of appropriate substantive mandates, this decreasing trend of hearings held relative to industry activity occurred "despite little change in the public interest mandate, standing test or power to grant discretionary participation."[151] This suggests that underlying rationales are in play, and there are allegations of moving goalposts. The apparent change in the meaningfulness of participation that does occur further suggests that standing is influenced by latent receptivity to hearings.

4.3 The Regulatory Enhancement Project

The Regulatory Enhancement Project was a provincial initiative aimed at increasing the competitiveness of the provincial oil and gas industry. It resulted in legislative reforms creating the AER. The mandate of the AUC was not affected by these reforms.

The main proposal was to establish a "single regulator" for oil and gas that would take over the functions of the environment and public lands regulators for these particular industries. The scope of regulated industries was expanded to include coal since that was already a function of the ERCB.

The Regulatory Enhancement Project stated that the single regulator would not "just be an expanded ERCB."[152] On the other hand, the anticipated reforms mostly focused on

[149] ELC Report on Standing, supra note 1 at 50.

[150] For examples, see: Re. Shell Jutland (1986) ERCB Decision 86-2; Re. Shell (1987) ERCB Decision 87-16; Re. Shell (1988) ERCB Decision 88-16; Re. Husky (1994) ERCB Decision 94-2.

[151] ELC Report on Standing, *supra* note 1 at 50.

[152] Nickie Vlavianos, "A Single regulator for oil and gas development in Alberta? A Critical Asssessment of the current proposal" (2012) 113 Resources 1, citing Regulatory Enhancement Project documents.

increasing regulatory process efficiency by transferring existing functions to the new regulator.[153]

While the background recognized concerns about the uncertainty of substantive regulatory mandates, the Regulatory Enhancement Project did not really explore longstanding concerns such as the two-step process of mineral leasing and development approval, or the lack of guidance for determining the public interest on development applications.[154] The reforms also proceeded despite warnings about Alberta's ongoing struggle with cumulative effects management and unfinished regional planning.[155]

Public participation issues were brought to the attention of the initiative; they, however, did not receive much detailed analysis in the reform proposals. Probably the most important aspect of the Regulatory Enhancement Project concerning public interest mandates and standing was a statement of intent to create a separation between policy development and "policy assurance" (i.e. policy delivery or implementation). Policy development would continue to be the function of government ministries, while policy assurance would be the function of the regulator. The documents proposed streaming public concerns into policy development and keeping regulatory hearings for private concerns. They also proposed keeping the directly affected test for standing. The reform proposals did not clarify any formalized process for being heard on policy development or at any other stage of the resource development process other than regulatory hearings. Overall, the Regulatory Enhancement Project largely envisioned maintaining the status quo around standing and public participation more generally.[156]

[153] *Ibid*.

[154] *Ibid.*

[155] *Ibid.*

[156] *Ibid.*

5. Recent developments on standing at the AER and the AUC

This section reviews more recent developments related to standing at the AER and AUC so as to highlight where these follow or diverge from the established trends, discussed above. It also compares the two regulators to each other. There are currently important differences between the two regulators concerning their mandates, rules of standing, and practices for determining standing. Nonetheless, the central trends in Alberta continue.

5.1 Alberta Utilities Commission (AUC)

The AUC was not affected by the Regulatory Enhancement Project and therefore provides an important look at shifts in practice under the longstanding legislative regime.

5.1.1 Mandate of the AUC

The Alberta Utilities Commission (AUC) describes itself as the provincial agency that "regulates the utilities sector, natural gas and electricity markets to protect social, economic and environmental interests of Alberta where competitive market forces do not."[157] It is an independent, quasi-judicial body engages with the utility sector on a wide range of issues from rate control to facility approvals. The underlying goal of the AUC is to "ensure that the delivery of Alberta's utility service takes place in a manner that is fair, responsible and in the public interest."[158]

The AUC continues to operate under the type of mandate that was prescribed to each of the AUC, the former ERCB and the NRCB. The legislation establishing the AUC provides

[157] Alberta Utilities Commission, "What we do." http://www.auc.ab.ca/about-the-auc/what-we-do/Pages/default.aspx (accessed July 5, 2016)

[158] Alberta Utilities Commission, "Who we are." http://www.auc.ab.ca/about-the-auc/who-we-are/Pages/default.aspx (accessed July 5, 2016)

that when a development application is submitted to the AUC, the AUC must consider, along with all other relevant requirements, whether the development is in the public interest with regard to the social, environmental and economic effects of the project.[159]

The AUC has shown some propensity to interpret the public interest mandate more broadly than the prior ERCB and this may have contributed to a slightly broader view of standing. Regarding environmental considerations, the AUC has expressed the public interest mandate as providing authority to impose conditions that go beyond the regulatory baseline onto project approvals. Interveners had impact in such cases, such as in *Re. Capital Power*, discussed at length below.

The ABCA recently affirmed a broad view of the AUC mandate as including social, environmental and economic considerations in the 2015 case of *Berger v. Alberta (Utilities Commission)*.[160] However, it is worth noting that this was only a decision on permission to appeal; standing was not at issue. Some uncertainty around the AUC mandate has been created by legislation allowing Cabinet to designate electric transmissions lines as critical infrastructure, but again this may not impact the approach to standing.[161] Overall, there is less concern about the AUC's interpretation of its public interest mandate driving a restrictive approach to standing as has been alleged with the oil and gas regulators.

5.1.2 Rules of standing at the AUC

Legislation mandating the AUC provides baseline authority to make decisions without giving notice or holding hearings.[162] However, if a decision on an application "may directly and adversely affect the rights of a person" then the AUC must provide notice of the application, give the person a reasonable opportunity to learn the facts being presented by the proponent, and hold a hearing. However, the AUC is still not required to hold a hearing if no one requests a hearing and the proponent has met the AUC's rules respecting each "owner of land" that may be directly and adversely affected by the

[159] *Alberta Utilities Commission Act*, R.S. 2007, c. A-37.2 s.17(1). http://www.qp.alberta.ca/documents/Acts/A37P2.pdf

[160] *Berger v. Alberta (Utilities Commission)* 2015 ABCA 153.

[161] *Shaw v. Alberta (Utilities Commission)* 2012 ABCA 378, considering *Electric Statutes Ammendment Act* [spent].

[162] *AUC Act*, *supra* note 190 s. 9.

decision. Further, the AUC is not required to provide opportunity to make oral representations if it affords an adequate opportunity to make written representations.[163]

Some features of the above provisions are that the legislation:

- defines "rights" as what must be affected, in contrast to a person who could be directly and adversely affected
- offers a means for proponents to avoid a hearing by discharging regulatory obligations towards landowners
- does not guarantee hearings if written representations can provide the same opportunities

The provisions imply focus on land rights and may suggest that hearings are triggered as a form of last resort. However, they do not go so far as to limit standing to landowners or prohibit hearings in the absence of prior process. If a person's rights may be directly and adversely affected then this person has legal standing to make representations, and meeting the regulator's duty to provide opportunities may require a hearing.

5.1.3 Determinations of standing by the AUC

The AUC has a longstanding practice of publishing its decisions on standing, including those that do or do not find persons to be directly and adversely affected. These decisions include explanation of "how the commission determines standing." This assists with analysis of the AUC's approach and it might help provide more clarity around who has standing.

It is worth considering that the diversity of projects regulated by the AUC can raise very different standing issues and that this may impact the AUC's practice in applying the standing test. For example, there seems to be differences between:

- Coal-fired power plants, when reliance on geographic location as a condition to trigger a hearing may create the possibility that no one will be able to pass the test and trigger a hearing, despite the fact that these are large projects that could present significant environmental concerns.
- Transmission lines, which almost always result in hearings as numerous landowners will be considered directly and adversely affected. This suggests that the issues are more with efficient determinations of standing, assignment of participant roles, and other process management challenges.

[163] *Ibid.*

- Hydroelectric dams, which could lead to federal involvement and thus broaden standing as compared to what Alberta would grant. Such dams are uncommon in Alberta, however.
- Wind power, which resembles conventional oil and gas in that there may be many small projects, often on private land, with could mean numerous requests for hearings.

To date, most issues that the AUC has decided have been around coal plants and transmission lines, and it appears that the transmission line context has had more impact on AUC practice.

The AUC continues to follow *Dene Tha* articulation of a two-part test, discussed above. Concerning the first part of the test, the legal question, the AUC appears to take a narrow view of rights that a person can claim to be potentially affected by the proposed project. This is consistent with the wording of the legislation and the early case law.

Based on recent AUC decisions, the rights the AUC appears willing to recognize are almost exclusively property rights and Aboriginal rights. Property rights are often acknowledged by the commission as they are easily provable claims (by way of title) and are treated as self-evident of their proof of right.[164] For Aboriginal rights claims, the commission regularly "assumes without deciding"[165] that Aboriginal groups' claims of Aboriginal and/or treaty rights are legitimate and these rights do in fact exist.

Concerning the factual part of the test, recent AUC practice continues and might intensify the Alberta trend of preferring geographic proximity and specificity of impacts.

[164] Ruling on standing Oldman 2 Wind Farm Limited Post-Construction Noise Study, Proceeding 21191, Application 21191-A001, (2016), para 17; Second Ruling on Standing in Fort McMurray West, para 96, 104, & 111; Ruling on standing for Fort McMurray West, para 14; Alberta Utilities Commission, Ruling on Standing for Harry Smith 367S Substation Connection, Proceeding 20987, Application 20987-A001 to 20987-A010, (2016), para 14; Ruling on standing in Proceeding 20924, paras 13 & 16; Fourth ruling on standing in Proceeding 3386 paras 20-21.

[165] Second Ruling on Standing in Fort McMurray West; Ruling on standing in Oldman 2; Alberta Utilities Commission, Ruling on standing for Time Extension for TAMA Power Sundance 7 Power Plant, Proceeding 21062, Application 21062-A001, (2016); Alberta Utilities Commission, Ruling on the Bigstone Cree Nation Request for Standing in Sunnybrook and Livock Substation Modifications, Proceeding 20736, Application 20736-A001.

Geographic proximity

AUC decisions on standing justify focus on proximity with reference to the ABCA's statement in *Dene Tha* that "some degree of location and connection between the work proposed and the right asserted is reasonable."[166]

Many recent AUC decisions involve use of a set geographic distance from the project, typically 800 metres, as an indicator of standing. Some aboriginal groups are given a slightly larger radius. Typically, the context of this practice is powerline development where hearings are certain to occur and could be large. The practice has further been part of an "enhanced participation process."[167] First seen in the Heartland Transmission Project in 2010, the enhanced participation process was applauded at the time for presuming standing to parties within 800 metres of the proposed routes, in addition to clarifying process early on, engaging interested parties early, and providing a choice for participant roles.[168]

When applying the geographic proximity test, the AUC will typically classify individual landowners or residents into those within 800 m of the project and those outside that radius. The AUC has on several occasions granted blanket standing to every person holding land within 800 m of the proposed project.[169] This presumptive opportunity for standing is indicated in the notice of project applications, and persons inside the radius may not be required to produce any further evidence at all. In at least one decision it appears that those within 800 were uniformly granted standing while those outside the radius were uniformly denied standing.[170] While multiple other decisions have denied standing to persons outside the 800 meter radius, this is not framed as an automatic dismissal. Instead it would appear that persons outside the radius may face much higher

[166] Dene Tha' First, supra note 157 at 14.
[167] Government of Alberta, "AUC Launches Enhanced Participation Opportunities for Heartland Transmission Project" (January 20, 2010). https://www.alberta.ca/release.cfm?xID=276704CA630BE-CA3C-4933-5B10F10AE6BF2E28
[168] Environmental Law Centre, "Kudos to the AUC for enhancing public participation." (January 22, 2010). http://elc.ab.ca/kudos-to-the-auc-for-enhancing-public-participation/
[169] Ruling on Standing for Fort McMurray West; Ruling on Standing in Proceeding 20924; Third ruling on standing in Proceeding 3386; Fourth Ruling on standing in Proceeding 3386; Alberta Utilities Commission, Second ruling on standing in Proceeding 3386 Foothills Area Transmission Development Plan, Proceeding 3386, Applications 1610795 and 1610807.
[170] Ruling on Standing in Proceeding 20924, paras 14-15; Fourth ruling on standing in Proceeding 3386 paras 20-21.

evidentiary standards.[171,172] This approach in such cases appears to come closer to expecting evidence of causal links between projects and alleged harms.[173174]

Over the last year of standing decisions, no landowner, public interest organization, or local government expressly more than 1 km from the proposed project has succeeded in persuading the AUC that it may be directly and adversely affected by the project.[175]

Specificity

AUC is unwilling to grant standing to a person or group who merely claims a direct and adverse effect without providing specific evidence.[176] It has been very willing to deny standing in cases when the harm being claimed is general and imprecise (such as contributions to climate change, impact to way of life).[177] This appears to be for the purpose of ensuring that this harm is demonstrable and connected to the project.

Multiple recent decisions concerning inadequate specificity revolved around requests for standing from Aboriginal groups, and in particular lack of specific explanation as to how their Aboriginal or treaty rights may be affected. In some cases, the commission offers the opportunity for the aboriginal parties to submit further information supporting their claim, but often the information is still insufficient. An example of an unsuccessful claim is the Driftpile First Nation's Statement of Intent to Participate, which according to the AUC stated that "the project would cut through its traditional

[171] Second Ruling on Standing for Fort McMurray West Project, paras 44, 48, 53, 55, 98, & 107; Alberta Utilities Commission, Ruling on Standing for Fort McMurray West 500-kV Transmission Project, Proceeding 21030, Application 20130-A001 to 21030-A015, (2016), paras 24 & 26; Alberta Utilities Commission, Ruling on standing in Proceeding 20924, Cooking Lake, Saunders Lake, Wabamun and Leduc Developments, Proceeding 20924, Applications 20924-A001 and 20924-A003 to 20923-A013, (2016), para 15. Alberta Utilities Commission, Third ruling on standing in Proceeding 3386 138-kV Transmission System Reinforcement in South Calgary, Proceeding 3386, Applications 1610795 and 1610807, (2015), para 19.

[172] Ibid, para 53; Alberta Utilities Commission, Fourth Ruling on standing in Proceeding 3386 Foothills Area Transmission Development Plan, Proceeding 3386, Applications 1610795 and 1610807, (2015), para 21. Ruling on Standing in Proceeding 20934, para 15.

[173] For examples, see Third ruling on standing in Proceeding 3386, para 19; Fourth ruling on standing in Proceeding 3386, para 21.

[174] Second Ruling on Standing in Fort McMurray West, para 98.

[175] See Appendix A.

[176] *Decision on Review Application of the Métis Nation of Alberta of the Standing Ruling for the Fort McMurray West 500-kV Transmission Project.* (2016), Decision 21030-D01-2016. Second Ruling on Standing in Fort McMurray West, paras 61, 52-53, 55, 61, 67, & 86.

[177] *Ibid*, paras 41, 61, & 79; Decision on TransAlta MidAmerican Partnership Sundance 7 Power Plant Time Extension (2016), 21062-D01-2016, para 26; Ruling on standing in Proceeding 20924¸ para 15.

lands in an area which is heavily used by its members for hunting, fishing, and gathering food and medicinal plants." The AUC did not find this persuasive because "Driftpile First Nation did not file any specific information on where its members exercise their aboriginal and treaty rights in relation to the project."[178]

However, in the same project, the Fort McKay First Nation's Statement of Intent to Participate met the higher degree of specificity the commission seemed to seek. The AUC recognized that "there are several specific traditional activity sites both on, and within, two kilometers of the project. These submissions are relatively specific and show a degree of location or connection between the project and the Fort McKay First Nation's aboriginal and treaty rights to meet the factual component of the standing test."[179]

This demand for specificity continues the historic trend, and the prevalence of Aboriginal Peoples is analogous to the foundational cases of Whitefish Lake and *Dene Tha*. These are cases of clear rights and practical challenges to bringing evidence.

5.1.4 Judicial consideration of standing at the AUC

The ABCA has not needed to consider nearly as many appeals of participation issues concerning the AUC compared to appeals from oil and gas regulators. Nor has it seen the type of egregious denials of standing implied by the court's reasons in the *Kelly* sour gas cases.

What cases exist have shown propensity to uphold AUC decisions. In *Cheyne vs. Alberta (Utilities Commission)* it upheld a denial of standing to landowners that the AUC found did not show adverse economic impacts on account of the proposed project.[180] In *Pembina Institute v. Alberta (Utilities Commission),* the ABCA documented how a coal plant was issued an "interim" approval with no hearing becuase no one party was granted standing.[181] The appellants (in this case, the authors of this report) sought to challenge the legality of the approval decision and would have qualified for standing in court. However, the appeal was dismissed as moot as the AUC had since replaced the interim decision with a final decision.

[178] *Supra* note 208, para 55.

[179] *Supra* note 208, para 59.

[180] *Cheyne*, supra note 163.

[181] *Pembina Institute v. Alberta (Utilities Commission), supra* note 53.

In the 2015 case of *Berger v. Alberta (Utilities Commission)* the ABCA denied numerous landowners permission to appeal the AUC's approval of an electric transmission line based on procedural fairness concerns related to the proponent's consultation. These cases are all different in nature so there has not been much shift in the jurisprudence since *Dene Tha*.

5.1.5 Impacts of AUC approach to standing.

One key practice to consider regarding the AUC is its reliance on set geographic distance from projects as a factual indicator of standing. This practice has pros and cons.

One positive is that it creates a presumption of standing rather than putting the full onus of proof on the person seeking standing. This assists with access to justice for landowners and residents. Foreseeably, many such persons would face challenges with the complexity of the standing test and the evidentiary burdens that it creates and so might otherwise be denied standing even if they could theoretically qualify. It also serves efficiency goals as it helps avoid disputes on standing and negates the need to fully apply the standing test. This speaks to possible benefits for participants, proponents and the regulator in situations where hearings are certain to occur.

One problem with reliance on a strict geographic radius is the bluntness of the tool. It does not accurately predict the potential impacts on a local resident's livelihood or health, or on the environmental condition of their land. A corporate industrial owner inside the radius could have standing despite not being "adversely" affected to any great degree. Meanwhile, the owner of a conservation area might not be "directly" affected on account of distance.

Another concern with the practice is uncertain or multiple evidentiary standards. Persons outside of the radius are invariably required to show more evidence and some articulations of the requirement place greater demands on these persons to show causation of harms. The decisions trends suggest that the standard of proof required to demonstrate harm outside of the 800 m radius appears to be almost insurmountably high. If persons inside the radius all receive standing and those outside the radius are all denied standing it becomes hard to see that there is any real standard in play.

The merits of the strict proximity approach may be tied to the certainty of a hearing, which is mostly the case for powerlines and other linear projects. For non-linear projects, remote areas or public lands, reliance on strict geographic proximity is a significant issue as a project of significance could be approved with no hearing at all.

The AUC appears to be fairly efficient and it does not appear that granting standing is causing any serious inefficiency. Annual reports from the Ministry of Energy indicate that the AUC has scored very high on timeliness of decisions for several years running.[182] These reports recount the AUC's streamlining initiatives including a variety of opportunities to provide input into public review process.

The AUC does not hold many hearings compared to the volume of applications; however, it may show greater propensity to hold hearings than the former ERCB. For 2013-2014, the AUC received 1,010 applications and issued over 700 decisions of which only 22 came from oral proceedings.[183]

This current efficiency suggests that the AUC could absorb any impact of a broader standing test in terms of number of hearings triggered. Ability to trigger hearings is most needed for infrequent but potentially high-impact projects like gas fired power plants. It is worth noting that new coal plant construction, in the past a source of public interest concern, is not part of the current policy direction, so chance of opening the floodgates is near none. A similar situation exists for hydroelectric, which has historically been uncommon but for which the current standing test would unduly prevent hearings or limit participation.

The greater efficiency issue at the AUC may be with managing large powerline hearings that are certain to occur and where the numerical majority of participants are landowners rather than Aboriginal peoples or public interest representatives. The AUC's current approach to determining standing and offering other participation opportunities is geared towards that challenge, and it would not be undermined by allowing a broader range of interests to have standing.

5.2 Alberta Energy Regulator (AER)

The AER was created and the ERCB was terminated by the *Responsible Energy Development Act (REDA)*.[184] REDA provides the AER with a different structure from other provincial regulators in several regards that are relevant to holding hearings, granting standing and making rules on these matters:

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[182] Ministry of Energy, Annual Reports, see AUC "facilities" applications online: http://www.energy.alberta.ca/About_Us/1001.asp

[183] *ibid*.

[184] *Responsible Energy Development Act*, SA 2012, c R-17.3 [REDA].

- The AER is established as a corporation and is not an "agent of the Crown."[185]
- A board of directors is be responsible for general management of the AER and may delegate functions of the AER.[186]
- A CEO responsible for day-to-day operations.[187]
- Cabinet is required to establish a roster of hearing commissioners that cannot include the directors or CEO.[188]

A panel of hearing commissioners conducts AER hearings, regulatory appeals and reconsiderations. REDA also contemplates hearing commissioners participating in the development of the AER's practices, procedures and rules. However, regulations under REDA limit ability to delegate rule-making authority to hearing commissioners.

5.2.1 Mandate of the AER

REDA abandons the traditional provisions that mandated regulators to determine if projects were in the public interest with regard to economic, social and environmental impacts. Under REDA, the mandate of the regulator is to "provide for the efficient, safe, orderly and environmentally responsible development of energy resources" and to regulate public lands, the environment and water with respect to energy resource activities.[189] This provision speaks to both the consolidated functions of the AER and the substantive outcomes sought.

Functions

REDA provides that the AER's mandate will be carried out under energy resource enactments as well as "specified enactments" related to water, environment, public lands and minerals exploration.[190] In cases of energy resource activities, the AER carries out the functions that would be otherwise carried out by other officials under the specified enactments, and the matters must be considered according to REDA and its regulations and rules instead of those of the other enactments.[191] REDA also provides that applications under multiple statutes may be considered jointly or separately as the

[185] *Ibid,* s. 3 and s.4.

[186] *Ibid,* s. 6(1).

[187] *Ibid,* s.7(1).

[188] *Ibid,* s.11(3).

[189] *Ibid,* s. 2(1).

[190] *Ibid*, s.2(2).

[191] *Ibid,* s. 24.

AER considers appropriate. REDA further gives the AER powers incidental to carrying out its functions; Cabinet can also assign the AER authority that is not specified by legislation. These provisions legally establish the single regulator model. Functions transferred to the AER at this time include environmental approvals, water licensing, public land dispositions, environmental impact assessment and land reclamation.

However, REDA is less detailed concerning regulatory process. It leaves much to regulations, rules and significant discretion of the AER. The AER is essentially a work in progress and this may have been the intention.

Substantive considerations

REDA provides, factors for the AER to consider on applications, appeals, reconsiderations and inquiries include those factors prescribed by regulations, notably including the interest of landowners[192] Regulations under REDA further provide that the AER must consider:

- the social and economic effects of the energy resource activity
- the effects of the energy resource activity on the environment
- the impacts on a landowner as a result of the use of the land on which the energy resource activity is or will be located.[193]

Despite not including the former "public interest" mandate in REDA itself, the substantive considerations are basically the same broad environmental, social and economic categories. The substantive environmental mandate of the AER may be broader and more detailed than that of the former ERCB as it now makes decisions under the environment, water, and public lands legislation. Uncertainty about the scope of the mandate and the implications for public participation may continue.

5.2.2 Standing under the Responsible Energy Development Act

REDA provides for multiple stages of public participation on regulatory applications. These include:

- statements of concern prior to approval decisions
- hearings on approval decisions
- reconsiderations

[192] *Ibid*, s. 15.

[193] *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013, s. 3. [REDA General Regulations]

- regulatory appeals (appeals on decisions of the AER to the AER)

The test for standing at all stages is some variation of "directly and adversely affected" but with important differences from the prior regime:

- The multiple articulations of the test (such as "may" and "is" directly and adversely affected) vary with potential implications for the rights of the person, and the obligations of the AER.
- Every opportunity for submissions or hearings potentially involves discretion by the AER. Although not clearly outlined, there may be discretion to deny standing to persons who pass the standing test and discretion to provide standing to persons who do not.
- It is not clear that standing is the trigger for hearings, and if not then what is.

Statements of concern

REDA provides that a statement of concern on applications to the AER may be submitted by persons who believe that they may be directly and adversely affected.[194]

The significance of the person's subjective belief is unclear as the submission process still puts an onus of proof on the person and provides the AER with authority to reject statements of concern based on its own finding.

The AER Rules of Practice require that statements of concern indicate:[195]

- why the person may be directly and adversely affected
- the nature of the objection
- the outcome of the application being sought
- the location of land, residence or activity of the person in relation to the location of the energy resource activity.

AER rules imply preference for geographic proximity in determining who may be directly affected.

The AER Rules of Practice also invite statements of concern for "special matters."[196] These are circumstances where a person may be directly and adversely affected by decisions on approvals or contaminated sites under the *Environmental Protection and*

[194] *REDA*, *supra* note 216, s.32

[195] *Alberta Energy Regulator Rules of Practice*, Alberta Regulation 99/2013, s. 6(1)(a), available online: https://www.aer.ca/rules-and-regulations/acts-and-rules [AER Rules].

[196] *Ibid*, s. 6.1(1).

Enhancement Act (EPEA), licences or approvals under the *Water Act*, or decisions to suspend or cancel dispositions under the *Public Lands Act*.

The Rules of Practice provide that the AER may disregard statements of concern for reasons including:

- The person did not demonstrate that they may be directly and adversely affected.
- The statement was not filed within the time specified by the rules.
- A decision on the application was made before the statement of concern was filed.
- For any other reasons that the AER considers that the statement was not properly before it.[197]

Further, the AER may disregard a specific concern within a statement of concern for a number of reasons. These include that the concern:

- relates to matters outside the AER's jurisdiction
- is unrelated to the application or relates to matters beyond the scope of the application
- has been adequately dealt with under other statutes or decisions on other applications
- relates to a policy decision of the government
- is frivolous, vexatious, an abuse of process or without merit
- is so vague that the AER cannot determine the nature of it[198]

Regulations under REDA further provide that statements of concern raising policy development matters may be forwarded by the AER to the Minister.[199]

Rights to file statements of concern are linked to the notice system. Typically statements of concern must be filed within the time provided by notice of the activity and the AER may not make a decision until this time period has passed.[200] However, an expedited (i.e. streamlined) approval allows statements of concern to be filed at any time prior to the decision, but equally allows decisions to be made without considering statements of concern. As the name suggests, these expedited decisions are likely to be

[197] *Ibid,* s.6.2(1).

[198] *Ibid,* s.6.2(2)

[199] *REDA General Regulations*, *supra* note _225, s. 7

[200] *REDA*, *supra* note 216, s. 31; AER Rules, *supra* note 227, s.5.2.

made in a much shorter timeframe, limiting the opportunity for a person who believes they are directly and adversely affected to have their submissions considered.

Hearings on project applications

Where a statement of concern is filed, the regulator must decide according to REDA and the rules whether or not to hold a hearing.[201]

The AER must hold a hearing where required by an energy resource statute, by the rules or by regulations.[202] The current versions of these various instruments do not establish many clear hearing triggers. REDA itself lacks any direct triggers for hearings on regulatory applications. Requirements for hearings under other energy statutes are very limited. For example, hearings are required on the design of a compensation scheme for persons injured by orders under the *Oil and Gas Conservation Act*[203] or adoption of a scheme prepared by the regulator to maximize oil sands or crude bitumen recovery under the *Oil Sands Conservation Act*.[204] The current regulations under REDA do not require hearings on applications.

The Rules of Practice do not clearly require hearings in any situation; however, they do provide several factors for the AER to consider when deciding whether or not to hold a hearing. This include whether:

- any of the circumstances related to the screening of statements of concern discussed above apply
- the objection raised in a statement of concern has been addressed to the satisfaction of the AER
- the applicant and filers of statements of concern have made efforts to resolve the issues through a dispute resolution meeting or otherwise
- the application falls under the expedited approval process
- the matters has been dealt with through other proceedings or decisions
- the Crown has requested a hearing to assess impacts on Aboriginal peoples
- the application will result in minimal or no adverse effect on the environment
- for *Water Act* applications, it would result in minimal or no adverse effect on the aquatic environment, or users or licensees under the *Water Act*

[201] *REDA*, *ibid*, s.33.

[202] *REDA*, *ibid*, s. 34

[203] *Oil and Gas Conservation Act*, RSA 2000, c O-6, s.99(1).

[204] *Oil Sands Conservation Act*, supra note , s 18 (4)(a).

- whether the matter is part of a cooperative proceeding (historically most often a joint review with federal authorities)
- any other factor the AER considers appropriate

Overall, REDA does not require triggering hearings based on the standing of a person, by most types of applications to the regulator, or due to the nature of the substantive issues to be decided. Effectively, REDA provides no rights or opportunities for standing unless the AER exercises discretion to hold a hearing. Only if the AER decides to hold a hearing does REDA then provide a person who may be directly and adversely affected with a right to be heard in those proceedings.[205]

If a hearing is recommended, then the Rules of Practice provide for public notice and additional participants. Persons wishing to participate must file a request and serve a copy on the applicant. Requests to participate must contain [among other matters]:[206]

- copies of statements of concern or reasons why statements were not filed
- how the person may be directly and adversely affected or, if that is not the case, then the nature of the person's interest in the matter and why they should be permitted to participate
- for persons who will not be directly and adversely affected, an explanation of how:
    - participation will materially assist the regulator in deciding the matter that is the subject of the hearing
    - the person has a tangible interest in the hearing
    - the participation will not unnecessarily delay the hearing
    - the person will not repeat or duplicate evidence of other parties
    - the outcome of the application the person advocates
    - the nature and scope of the person's intended participation
    - if the person acts on behalf of a group or association, the nature of the person's membership in the group or association
- any efforts to resolve issues directly with the applicant

The AER may refuse participation requests for circumstances including:[207]

- Requests to participate are frivolous, vexatious, an abuse of process or without merit.

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[205] *REDA*, *supra* note 216, s. 34(3).

[206] AER Rules, *supra* note 227, s. 9(2).

[207] *Ibid*, s. 9(3).

- The person has not shown that they may be directly and adversely affected.
- For groups or associations, the request does not show that a majority of persons in the group or association may be directly and adversely affected.
- The person has not shown that
  - participation will materially assist the regulator in deciding the matter
  - the person has a tangible interest
  - participation will not unnecessarily delay the hearing
  - the person will not repeat or duplicate evidence, or
  - for any other reason the regulator considers appropriate.

If a request to participate is granted then the Rules provide that the AER must specify the nature and scope of the participation, including whether the person can make oral representations or only written submissions, question witnesses and specify issues.

All parties participating in hearings must file submissions stating the outcome sought, the facts they propose to show in evidence, their intended witnesses and the reasons why the AER should decide in the manner that they advocate. Persons granted party status can also request pre-hearing meetings to determine issues and procedural matters.

The Rules also provide for guidance on hearing process. This includes pre-hearing meetings, technical meetings, use of expert witnesses and witness panels, presenting evidence and submissions by staff of the AER.

Reconsiderations

REDA and the rules distinguish reconsiderations from regulatory appeals. REDA provides that the AER at its sole discretion may reconsider a decision.[208] It does not expressly provide means for other persons to request reconsiderations, and the Rules only contemplate requests by the Crown concerning impacts on Aboriginal rights.[209]

The Rules provide that their provisions concerning hearings on applications also apply to reconsiderations. This would include requests to participate, the nature and scope of participation, and submissions on the merits. The Rules also provide that if the AER sets a reconsideration for a hearing then notice requirements are similar to those that apply to hearings on applications.

[208] *REDA*, *supra* note 216, s. 42.

[209] AER Rules, *supra* note 227, s. 34.1.

Regulatory appeals

REDA provides that an "eligible person" may request a regulatory appeal of an "appealable decision." This is effectively a two-part screening: the decision must be one that can be appealed and the person must have standing.

An appealable decision is one of:[210]

- a decision where a person would be entitled to submit notice of appeal under EPEA, the *Water Act* or *Public Lands Act*
- a decision under an energy resource statute made without a hearing
- a decision or class of decisions prescribed by regulations.

REDA provides that an eligible person is:

- a person who would have a right to appeal decisions under EPEA, the *Water Act* or *Public Lands Act*
- a person who "is" directly and adversely affected by a decision under an energy resource statute made without a hearing or
- a person or class of persons described by regulations.

The Rules do not make eligibility dependent on having submitted statement of concern, although it does require a copy of any statement of concern formerly submitted to be included with the request for a regulatory appeal, or an explanation as to why the requester did not file a statement of concern.

Further guidance on screening regulatory appeals is provided by Regulations,[211] requiring the AER to conduct a hearing if it appears that the concerns of the eligible person were not addressed through alternative dispute resolution process or otherwise resolved. This might suggest that rights to appeal hearings exist only after attempting resolution, or if circumstances preventing parties from seeking resolution.

Requests for appeals must be made according to the Rules of Practice. The Rules require that requests include:[212]

- why the person should be considered an "eligible person" under the Act
- the legal description or BPS co-ordinates of the land or residence of requester and the location of the energy resource activity being appealed

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[210] *REDA*, *supra* note 216, s. 36 (a).

[211] *REDA General Regulations*, *supra* note 225, s.4.

[212] AER Rules, *supra* note 227, s 30(1).

- a statement of the facts relevant to appeal and grounds on which appeal is made and the relief requested
- a copy of the statement of concern or explanation as to why the requester did not file a statement of concern.

REDA provides that requests or parts of requests for regulatory appeals may be dismissed if they are deemed frivolous, vexations or without merit; if a person did not file a statement of concern; or for other reasons. The Rules largely affirm that appeals may be dismissed fully or in part for the reasons provided by the act, and that the AER may proceed with the dismissed parts. As with statements of concerns and hearings, REDA and the Rules mostly provide reasons to avoid appeal hearings, lack criteria on when appeals hearings must be held, and may suggest that all appeals are discretionary.

If appeal hearings are triggered then the Rules of Practice provide that other persons may request to participate. The Rules provide for the mandatory contents of requests, the reasons for which the AER may refuse or allow participation, and the AER's duties to specify the nature and scope of participation.

These provisions largely mirror those concerning the addition of participants to hearings on applications.

The Rules concerning appeals provide that if the person requesting the regulatory appeal withdraws their request the AER must discontinue the appeal.[213] The implication is that the other participants would not be heard. This is a more rational characteristic of appeals compared to original decisions.

References to rights

REDA provides some general provisions on landowners and some regarding Aboriginal rights. These provisions may either reflect or direct focus on these categories of rights holders; however, they do not establish rules of standing.

Aboriginal consultations

REDA implies distinctions between the Crown's duty to consult Aboriginal peoples and participation in regulatory process. There have been legal uncertainties in recent years around the responsibilities of regulators to discharge the Crown's duty to consult or to rule on the adequacy of consultations. REDA provides that the AER has no jurisdiction

[213] AER Rules of Practice, *supra* note 227, s 32.4.

to assess the adequacy of Crown consultation associated with Aboriginal rights.[214] Also, as the AER is "not an agent of the Crown" it cannot discharge the Crown's duty. The case law discussed below recognizes the distinction between Aboriginal consultation process and the regulatory process. However, the REDA regime does contemplate the government referring some questions around Aboriginal rights to the AER.

5.2.3 Comments on standing under REDA

Parallel regimes

REDA expands the formal points of participation in the energy regulatory process. Statements of concern and administrative appeals from approval decisions are features of the previous environmental regulatory regime, so creating these opportunities can help the AER provide a more comparable process. Likewise an appeals board is a function of the public lands regime so the AER is providing a parallel. Allowing submission of statements of concern could also help identify concerns early and avoid hearings. However, REDA appears to be product of assumptions that use of the directly affected tests in the environmental regulatory regime was appropriate to begin with. Now it is possible the AER's tests are even more restrictive on the same matters. Further, there is also no independence of the appeals tribunal from the approval maker, as the AER considers appeals on its own decisions. The general scheme laid out in REDA is set to be superficially similar but potentially more restrictive.

Broad discretion

A key difference between the AER and the former ERCB, as well as other environmental regulators in Alberta, is that REDA suggests a degree of discretion in near every participation opportunity: accepting a statement of concern, deciding whether or not to hold a hearing, undertaking reconsiderations, and hearing appeals. It is possible that REDA does not provide any rights to hearings.

This appearance of near total discretion to avoid hearings is a change from the former ERCB regime under which standing was a trigger for a hearing. The prior legislation also did not clearly state that persons who may be directly affected had a right to a hearing, but it was consistently interpreted by the courts and applied by the ERCB in this way. The wording of the old legislation more closely resembled an encoding of common law duties of fairness; to draw the same implications from REDA is much more difficult.

[214] *REDA*, *supra* note 216, s. 21.

REDA may go even farther than the Regulatory Enhancement Project in its potential to avoid hearings.

On the other hand, REDA leaves much discretion to hold hearings and add participants. For appeals, REDA does not limit standing to persons that submitted statements of concern on applications. This is an improvement over the previous environmental regime which required persons to have filed statements of concern in order to file appeals, although the legislation suggests a preference for this.

The need is for more guidance on when, where, why and for what hearings will be held.

Guidance

REDA suggests more guidance on regulatory proceedings than did the prior legislation, although it can be described as more dismissive than permissive of public participation.

Overall, the Rules of Practice provide the AER with much direction on disregarding statements of concern and very little direction on when statements of concern should be accepted. Most of these reasons reflect general administrative tribunal practice. However, some reflect the intention of the Regulatory Enhancement Project to evict policy debate from regulatory proceedings.

The reasons to not hold hearings are broader than reasons to disregard statements of concern. Notably, they allow not holding hearings based on a preliminary assessment of substantive merits of environmental concerns. The only factor clearly in favour of a hearing is where one is requested by the Crown concerning Aboriginal rights issues, and required instances mentioned above under current energy enactments.

REDA clearly contemplates regulations requiring hearings to be held and the Rules could assist further in this area. This provides opportunity to expand potential hearing triggers. The former legislation simply provided the regulator with authority to initiate proceedings on its own motion and lacked guidance on when this should be used. The current Rules provide much guidance that was missing from the prior regime concerning the screening and role assignment for discretionary participants when the AER has decided to hold a hearing. The Rules may still favor directly affected persons or groups of such persons given that persons who do not pass this test are subject to significantly higher expectations concerning their positive and negative impacts on proceedings. However, the Rules definitely imply persons that are not directly affected may play full party roles if a hearing is triggered.

On the other hand, the guidance on screening participants provided through REDA and the Rules provides many reasons to dismiss requests for participation and very little guidance on when to accept statements of concern, trigger hearings, or hear appeals.

The AER rules for hearings show some preference for a formal process involving technical experts rather than an informal hearing of public concerns. The AER describes itself as quasi-judicial and given the preference for private rights this would foster adversarial hearings. It is an unsettled topic of debate as to which style extract the greatest impact from participation. The answer may be tied to one's view of the substantive mandate of the regulator as being broad or narrow.

5.2.4 Determinations of standing by the AER

The AER has been publishing some of its decisions on standing since at least October 2015.[215] This is a positive shift from the former ERCB practice of issuing letter decisions only to those who objected to a project. It improves transparency, facilitates analysis and may contribute to consistency in practice.

This report examined over 100 decisions from October 2015 through July 2016. The majority of decisions concerned denied requests for hearings submitted through statements of concern; also examined were requests to participate in hearings and requests for regulatory appeals. The majority of statements of concern requesting hearings were from residents in proximity to proposed projects, followed by First Nations or Metis groups. Other decisions concerned companies, freehold mineral owners (three), persons with trapping rights (two), and one municipality. We have included more details about the information used in our discussions and our methodology in our Appendix.

However, the nature of publicly posted decisions requires some caution. As the AER does not publish decisions in instances where an original application has been recommended for a hearing, the overwhelming majority of published decisions concern persons found not to be directly and adversely affected. Further, compared to the AUC, many of these decisions provide less elaboration on reasons for failure to pass the tests. The only public decisions available recognizing that a person(s) has been found to pass the directly and adversely affected tests concerned regulatory appeals rather than

[215] Alberta Energy Regulator, Participatory/Procedural Decisions. Available at: http://www.aer.ca/applications-and-notices/decision-reports/participatory-procedural-decisions (accessed on July 20th, 2016).

original approval decisions. There are at least three such decisions: one request for appeal and two requests to participate in an appeal.[216] The implication is that the following analysis mostly concerns how the AER determines when someone fails to qualify. There is need for more public information on when the AER finds that persons are or may be directly and adversely affected, especially when seeking hearings on original decisions.

Another important consideration is that AER organizational structure is relevant to determining standing. In a traditional regulatory board model, the same decision-maker could determine standing then preside over the substantive hearings. REDA does not prescribe who will decide to hold hearings and determine standing. However, such decisions on project applications will likely be made before a matter is referred to hearing commissioners. In practice, there are several branches of the AER that make participation decisions, and these may follow different decision-making process on those matters.

As with the AUC, the AER continues to apply the *Dene Tha* test to determine standing.

Concerning the first branch, the legal test, many of the rights asserted in many of the filings would pass. The nature of most persons seeking hearings suggest that there may be an understanding among potential participants of practical need for legal rights such as land rights, Aboriginal rights or trapping rights. In several decisions, ownership of the land (or rather, the lack thereof) is mentioned in the AER's rationale for a decision.[217] Aboriginal rights are among the more common submissions, arising in about one-fifth of decisions. While the AER does not appear to "assume without deciding" that Aboriginal rights exist, the determinations of standing really depend on the factual test.

As with past trends the majority of issues are factual and there is strong emphasis on need for connection between the project and the adverse impact on the right. There may

[216] These requests were primarily related to nearby residents, landowners, First Nations or permit holders (such as trapping or agricultural permits). *RE: Request for Regulatory Appeal by Patricia & Patrick Alexander and Evelyne Heringer (Alexanders and Heringer),* AER Regulatory Appeal No. 1834939; *Letter to Lucie Bouvier Request to Participate,* AER Regulatory Appeal 1857984 Proceeding; *Letter to Kingsbury and Sandra Manderville Request to Participate*, AER Regulatory Appeal 1857984 Proceeding.

[217] *Re: Request for Regulatory Appeal by Simon and Tina Kostawich* (August 10, 2016)*,* AER Regulatory Appeal No. 1851384; *Re: Statement of Concern No. 30290* (June 29, 2016); *Re: Statement of Concern No. 30273 on Applications No. 1857767 from Mancal Energy Inc.* (June 6, 2016); *Re: Statement of Concern No. 30211 on Applications No. 1823491 & 1834249* From terado gas Storage (December 10, 2015).

even be increasing focus on geographic proximity and specificity. This focus may be endorsed by the Rules discussed above.

Geographic proximity

The distance between projects and applicant land interests may be the most heavily cited factor, appearing in nearly three-quarters of decisions reviewed. Again this aligns with the Rules of Practice.

It may be reasonable to assume that the surface owners of land where projects are located are automatically considered directly and adversely affected. There are relatively few filings from surface owners. Of all decisions, only two decisions concern the surface owner and both are requests for a regulatory appeal. Of these two decisions, only one was required to establish a direct and adverse effect due to the nature of the decision,[218] and this decision found the landowner to be directly and adversely affected.

If a landowner is not the surface owner then there does not appear to be an exact degree of geographic proximity that establishes standing. Statement of concern filers have ranged from residents several hundred kilometres away to residents within a few hundred metres. Often times, distance was cited among the AER's rationales for why a person failed the factual test; however, decisions are apt to focus on the need to connect the project to the impacts on the rights, and this may simply be harder from farther away.

The impact of consultation and notification boundaries on standing is uncertain. It may depend on the source of the designation as between the Regulator's own directives and other tools like Aboriginal consultation zones. There were no examples of decisions concerning filers who were deemed in the consultation boundaries. Being located near (but not in) notification and consultation boundaries was not enough in many cases for a person to establish that they were directly and adversely affected. In a notable instance, a filer whose property and residence were 220 m and 280 m respectively away from the well center of the proposed project was not considered directly and adversely affected (the minimum requirement for this type of project was to consult residents within 200 metres of the project or notify landowners within 100 metres). In addition to other factors discussed in the decision, the AER found that there were grounds to

[218] For a decision on a reclamation certificate, the regulations allow for a person who is issued a copy of the certificate (such as the landowner) to appeal a decision without having to establish how they are directly and adversely affected. Regulatory Appeal 1837447 Proceeding ID 338 Charles Johnson; *Responsible Energy Development Act,* s. 36 (b)(i).

dismiss the statement of concern as this distance alone did not establish for the panel that these filers may be directly and adversely affected. In another instance, while responding to a statement of concern filed by a resident within 500 m of a proposed hydraulically fractured multi-well pad and multi-well oil battery, the Regulator directly referenced the fact that the resident was not within the 200 m notification requirement for the proposed wells, suggesting that this may be a consideration of being directly and adversely impacted.[219]

The approach to proximity may have differed slightly in cases where hearings were already triggered. It is still quite determinative but there may be less emphasis on exact location. In a pair of decisions concerning requests to participate in an appeal, two people were deemed directly and adversely affected specifically due to their proximity to the project, however a specific distance was not described in the decision.[220] Again, there are very few decisions granting standing from which to draw trends.

Specificity: In many decision rationales, the AER dismissed concerns as the filer "did not provide sufficient detail on where activities take place and what those activities are, or how those activities may be impacted by the project."[221] For Aboriginal groups, the AER continues the trend of seeking specifics of land use in relation to the project, even if the project is inside traditional territory. Similarly, filers who are concerned about the impact of nearby development on their trapping rights have been dismissed when they could not establish that they directly use the exact land in question.[222] In a hearing decision report, the panel described its rationale for denying a request for participation to a trapper, saying he had failed to "establish a degree of location or connection between the disturbance associated with the project and his use of the lands within or near the project."[223]

The AER regularly states that concerns are "general in nature" when dismissing both statements of concern and requests for regulatory appeal. Typically it has been used to

[219] Re: Statement of Concern NO. 29988 on Applications No. 1838099, 1838111, 1838112 and 1843089 from NEW Canada ULC (February 17, 2016). AER.

[220] The Regulatory Appeal was requested by other residents nearby to the project in July 2015, and therefore the original regulatory appeal is not published on the AER website. Supra note 284.

[221] Re: Statement of Concern No. 29182 on Application No. 1758947 from CENOVUS FCCL LTD (December 16. 2015)

[222] Re: Statement of Concern No. 29966, 30016, 30017, and 30018 on Applications No. 1839529, 1839540, 1839574 and OSE 150020 (December 10, 2015).

[223] Grand Rapid Pipeline GP Ltd. Applications for the Grand Rapid Project (October 9, 2014) Decision 2014 ABAER 012.

dismiss filers who are some distance away as not having established that they may still be impacted even if they do not reside in close proximity. However, it has also been used in the context of more specific concerns, such as impacts to health of residents and farm animals,[224] well site emissions and odours from hydraulic fracturing,[225] interference with the quiet enjoyment of their property,[226] and concerns about impacts to well water.[227]

5.2.5 Addressing public interest concerns

The AER's consideration of cumulative effects and health concerns through its standing test continues the trend established under the ERCB. In most instances, these concerns cannot satisfy the AER's preference for geographic connection and higher degrees of specificity.

Cumulative effects

Concerns around cumulative impacts[228] and interference on Aboriginal treaty rights,[229] are often referenced as "general in nature" and dismissed due to a lack of specificity and evidence of how these concerns adversely impact the filer. Filers who cite concerns of increased negative impacts from a proposed project as it would contribute to an increase in cumulative externalities in the area are very unlikely to establish the direct connection between the project and the person. If the project falls within the boundary of a regional plan area (specifically, the Lower Athabasca Regional Plan), a filer's concerns of this nature are dismissed as being addressed through this planning process.

Health effects

Every request for consideration related to health seems to have been dismissed for not providing enough information to substantiate the impacts to health.[230] On several

[224] Re: Request for Regulatory Appeal by George and Deanna Jenner (December 7, 2015). Regulatory Appeal No. 1838470.

[225] Re: Request for Regulatory Appeal by Mel Glasier (November 9, 2015). Regulatory Appeal No. 1833486

[226] Re: Request for Regulatory Appeal by Elsie & Henry Neumann; Ken & Dianna Mattson, Holly Boles and Allen & Dianne Pukanski (October 15, 2015). Regulatory Appeal No. 1838579.

[227] Re: Statement of Concern No. 29988 on No. 1838099, 1838111, 1838112 and 1843089 from NEP Canada Ltd. (February 17, 2016).

[228] Re: Statement of Concern No. 29183 on Application No. 17589 (December 16, 2015).

[229] Re: Statement of Concern No. 29965 on Applications No. A10016580, A10016579, A10016573 (June 1, 2016).

[230] Supra note 260; Supra note 258.

occasions concerns around health have been dismissed through references to current AER directives, suggesting that an assumed adherence to current AER directives negates concerns regarding health impacts.[231] In one instance, the filer cites specific health issues that correlate with nearby activities by the same project operator. Despite the operator having been found to be non-compliant with AER regulations in the past, the concerns were dismissed as having been addressed by current AER directives and rules.[232]

5.2.6 Judicial consideration of standing at the AER

Appeals to the ABCA from decisions of AER are available on questions of law and jurisdiction. REDA provides further direction to the ABCA that is very relevant to challenging decisions on standing.

On questions of fact, the court may draw inferences "not inconsistent with facts expressly found by regulator."[233] This seeks to maintain deference on questions of fact and the ABCA may have to assert jurisdiction to intervene if the AER's findings of fact are unreasonable. Concerning available relief, REDA provides that the ABCA shall refer matters back to the AER for reconsideration and redetermination. This aims to prevent the court from replacing the AER's decision with its own. This is reminiscent of the first *Kelly* case in which the ABCA ordered the ERCB to grant standing.

There are at least two decisions of the ABCA considering AER denials of requests for regulatory appeal. Both decisions are on applications for permission to appeal to the ABCA rather than rulings on the merits of the claims. However, both provide insight into how AER determines standing and the court's willingness to intervene. Little has changed from cases concerning the ERCB.

In the 2016 case of *Coulas vs. Ferus Natural Gas Fuels Inc.* the court granted an individual landowner leave to appeal the AER's denial of her request for regulatory appeal of a gas processing plant.[234] The plant was already operating when it was advised by the AER of need for approval. The landowner lived 1.5 kilometres away and had raised concerns about noise, safety and environmental issues. The operator had received concerns from

[231] Re: Request for Regulatory Appeal by Mark Roberts (February 1, 2016). Regulatory Appeal Nos.: 1839533; 1839537; 1839539; 1839542.

[232] ibid.

[233] REDA, supra note 216, s. 45(7)(b).

[234] *Coulas v. Ferus Natural Gas Fuels Inc* 2016 ABCA 332, available online: http://www.canlii.org/en/ab/abca/doc/2016/2016abca332/2016abca332.html?resultIndex=1

the individual, but did not provide her with notice of application as specified by the AER. The AER gave public notice of the application as required by REDA, but the individual did not see the notice and only found out after that fact that the application was granted without a hearing.

The AER found that the landowner was not an eligible person as she was not directly and adversely affected. In doing so it reasoned that this was an "administrative decision" that would not result in new construction. It further found that the plant complied with AER regulatory requirements including noise directives. Along with other factors it concluded that there were no adverse effects as a result of the approval decision.

Permission to appeal was granted on issues including the determination of eligible person, conclusions that this was merely an administrative decision, and "failure of natural justice" for granting an approval and denying an appeal with no hearing. The ABCA further noted that REDA is relatively new legislation and that it did not wish to constrain the court from considering all matters that might arise in the context of these questions.

In 2015 case of *O'Chiese First Nation v. AER* the ABCA denied a First Nation permission to appeal denial of standing for lack of a sufficient point of law.[235] As in prior cases the AER applied the *Dene Tha* test and the ABCA was unwilling to intervene into mixed questions of fact and law. The case is more useful for articulating the AER's approvals and appeal process. The challenge was to multiple applications for surface access under the *Public Lands Act.* Some of these applications required the AER to post public notice, and the First Nation submitted statements of concern. As required by REDA and the Rules of Practice the AER considered whether or not to hold a hearing. It found that the concerns raised by the First Nation were "general in nature" and did not provide sufficient information to demonstrate how it may be directly and adversely affected. The AER concluded that it was unnecessary to hold a hearing and issued the approvals. Further applications were under the expedited approval process and no statements of concern were filed before approval. In this case O'Chiese First Nation sought standing for the first time for these approvals at the regulatory appeals stage and was denied.

As in past Aboriginal cases the court had no real issue with finding rights but upheld the need for evidence of impacts. The decision also distinguished the Crown's duty to

[235] *O'Chiese First Nation v. Alberta Energy Regulator* , 2015 ABCA 348, available online: http://www.canlii.org/en/ab/abca/doc/2015/2015abca348/2015abca348.html?resultIndex=1

consult Aboriginal Peoples from questions of standing. The approvals occurred within a "consultation area" established by the provincial Department of Aboriginal Affairs for the purpose of helping the Crown discharge its duty to consult. The adequacy of consultation was not an issue for the court in this case. The reserve was roughly 16-20 km from the approvals. The court held that being inside the consultation zone and being owed the duty to consult did not as a matter of fact mean that the approvals "directly and adversely" affected the First Nation. It stated that if the legislature intended to provide a right to regulatory appeal anytime approvals were granted in a consultation zone then it could have done so.

5.2.7 Impacts of the AER approach to standing

While the AER has shown significant advances over the ERCB in developing rules, practices and public decisions on standing, many of the same issues and challenges continue. These generally relate to the nature of the standing tests and their narrow interpretation, and they may be aggravated by the nature of REDA. Accordingly, the impacts of the AER's approach to standing on the rationales for and against public participation continue the established trends seen under the former ERCB.

The AER continues the practice of the ERCB in imposing higher evidentiary barriers than required by the legislation or the courts. Onus of proof is always on the person seeking standing. The standard of proof in practice resembles need for causation due to the strong emphasis on need for connection between the adverse impacts and the project. Having two articulations of the tests — requiring that a person "may" be affected for hearings and "is" affected for appeals — complicates matters as there is chance for even more inconsistency and higher standards.

The fact that the AER does not seem to employ one fixed geographical distance from projects has pros and cons. Flexibility has some benefits where risks are shifting or uncertain. For example, returning to the *Kelly* cases and example of airborne pollution, persons farther away could be more exposed to adverse impacts than persons closer depending on weather conditions and geographic features of the land. The negative is that residents who are very close to proposed project locations have been denied standing, even in some cases where it would appear they are required to be consulted. In this case a distance of 800 m as used by the AUC would be an improvement on current practices, even if it is arbitrary.

Cumulative effects continues to be barrier to standing that, beyond the standing test, is linked back to challenges defining the regulator's mandate. Streaming concerns into regional planning is problematic for several reasons. The cumulative effects

management frameworks have not provided strong guidance to the regulators yet, and in many cases plans and frameworks don't exist and are several years away from being implemented. Regional plans can be interpreted as justifying approvals without need to show that cumulative effects are being managed; examples of this have already been seen.[236]

Cumulative effects on Aboriginal rights is a growing issue not faced to the same extent by the earlier oil and gas regulators. As recognized by the Lower Athabasca Regional Plan Review Panel,[237] there are no processes to determine, measure, or manage cumulative impacts to treaty rights and traditional land use. Many of the First Nations who submitted their concerns to this review panel were found to be directly and adversely affected by continuous project approvals that erode each First Nation's ability to practice these rights on these lands within their traditional territory.[238] However, the AER's participatory decisions also provide no mechanism to raise or recognize impacts to traditional land use unless there is a clear demonstration that the exact location is used by the filer in question. This demonstration does not account for impacts that disturbance has on nearby wildlife or fauna, and the resulting impact on exercising treaty rights. There are also current court cases concerning effects of energy development on Aboriginal rights. All of this may point to need for new regulatory processes.

Even if the AER were to accept cumulative effects as a form of effect that could led to standing, showing evidence of cumulative effects to the level of standards currently used by the AER would be a significant undertaking requiring expert help. This would be outside the capacity of most statement of concern filers. It would be necessary to recognize potential cumulative effects in a softer or more general way with respect to determinations of standing.

Health concerns continue to be extremely difficult grounds on which to obtain standing. This is despite such concerns being tangible individual interests that could be shown to be impacted by projects. Health concerns could foreseeably fit into the directly and

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[236] Alberta Energy Regulator, *Report of the Joint Review Panel: Shell Canada Energy: Jackpine Mine Expansion Project* (2013) Decision 2013 ABAER 011 para. 14. http://www.aer.ca/documents/decisions/2013/2013-ABAER-011.pdf

[237] Lower Athabasca Regional Plan Review Panel, *Review Panel Report* (2015). Executive Summary. http://landuse.alberta.ca/LandUse Documents/Lower Athabasca Regional Plan Review Panel Recommendations_2016-06-22.pdf

[238] *Ibid*, pg 172.

adversely affected test, but not the way that it is currently articulated and applied in Alberta. Lack of legal right, high standards of proof and an inconsistent yet stringent approach to proximity continue to be barriers. Reliance on regulatory directives to dismiss standing based on health claims appears to be a new development. This would fit with a narrow view of the regulator's mandate, namely that projects that comply with regulations are in the public interest and health impacts are not the AER's jurisdiction. This grounds for dismissal also seems unrelated to whether or not an individual is adversely affected. However, to obtain standing one would have to demonstrate that the AER's directives will not protect them individually from adverse health impact from that project. This creates significant evidentiary challenges and the standard may resemble need for causation. All of this continues trends from the ERCB.

The efficiency gains of the standing test remain hard to see and some more recent data might assist. For 2013, a transition year between ERCB and AER, publicly available information indicates that the regulator received roughly 34,000 applications, initially scheduled 21 decisions, and held 11 hearings, including one joint panel hearing.[239] In 2015/2016, the AER processed an astounding 47,000 applications,[240] in many instances considering multiple applications for single individual projects under multiple pieces of legislation as the "single regulator" approach was in full swing. However, only 15 files were recommended and considered for a hearing, and 4 hearings were actually completed. Clearly the high volume of applications contributes to the many requests for hearings discussed above, resulting in a pressure to avoid hearings. On the other hand, the AER could provide broader standing test without a large increase in the percentage of matters that go hearings. This is especially true if standing is discretionary. Litigation over standing continues to be a result of the regime and the case law on the AER specifically shows an increase in issues for dispute due to the complexity of the REDA regime.

On the other hand, the low level of surface owner requests for hearings indicates that providing standing and early involvement can help settle many local issues. This supports the concept of a balance of efficiency that could be applied more broadly.

[239] Alberta Energy Regulator, "Decisions". http://www.aer.ca/applications-and-notices/decisions

[240] Alberta Energy Regulator, *Annual Report 2015/2016* (2016). Available at: https://www.aer.ca/documents/reports/AER2015-16AnnualReport.pdf

6. Discussion and reform options

6.1 Impacts of the standing regime in Alberta

Consistent with past commentaries on standing,[241] and as our examination above of more recent standing decisions suggests, while the AUC has remaining fairly consistent in its application of an already narrow test, the AER continues the trend of the former ERCB in becoming increasingly narrow in its application of the directly and adversely affected tests. While it is obvious that broader public interest organizations are excluded from triggering hearings due to the nature of these tests, it is likely that many parties that do have tangible interests impacted by projects, including surface rights advocates, regional landowners, local citizens, community groups, recreational users, trappers, outfitters and Aboriginal Peoples, are often excluded from triggering a hearing. In the case of projects on public land for both the AUC and the AER, it may be very likely that no one will be capable of triggering a hearing at all.

There are two issues with the current standing regime in Alberta. First is the application of the current test, and the narrow interpretation that may exclude parties who are directly and adversely impacted. Second is the nature of the standing test, which inherently excludes representation of public interest concerns.

Excluding parties that may be adversely affected

For parties that may be considered directly and adversely affected, high evidentiary burdens create serious obstacles for small or less sophisticated parties, limiting their access to justice. For example, parties that may be concerned about the impact of air emissions from a proposed facility may not be sophisticated enough to establish — within the time constraints of a notice of application — the impacts of poor air quality on their health, despite current directives applied by a regulator. In addition, a very strong preference towards geographic proximity in determining direct effect is an additional barrier to the same party who may not reside immediately next door but nonetheless may be exposed to air quality issues as a result of the approval.

[241] ELC Report on Standing, *supra* note 1.

Potential instances of adverse effect that arise from concerns such as resulting air quality issues may be more difficult to assess than effects on parties in the immediate proximity of a project, but if standing tests are applied too narrowly and are exclusionary, these parties are not provided with a reasonable opportunity to furnish relevant evidence to the regulators on a decision that may adversely affect them. This may be contrary to the procedural rights afforded under the *Administrative Procedures and Jurisdiction Act*.[242][243] In the case of REDA, its application to date seems to affirm early criticisms that the regulatory overhaul that created the AER included a rollback of standing rights for directly and adversely affected people.

In the case of the AER, there is an increasing reliance on dispute resolution in place of more formal hearings. This is problematic in that some of the regulatory functions are externalized and reduced into discussions between two private parties. This dispute resolution process can be beneficial in certain instances and resolve some concerns for some parties, but these processes are better equipped to address and facilitate negotiation for specific private matters like surface access or timing considerations. Further, the decreasing likelihood of matters proceeding through a hearing may undermine a directly and adversely affected party's ability to negotiate in these instances if proponents are confident that there is little risk of enduring a more costly and longer hearing process if they fail to negotiate in good faith.

These processes do not effectively replace consideration of larger issues such as specific conditions to an approval, and their confidentiality prevents parties not included in discussions from learning the facts of the negotiation or contributing to the decisions themselves. With a hearing, parties concerned about adverse effects may be enabled to participate or contribute, while in dispute resolution, there is no mechanism for their inclusion.

Excluding broader public interest representation

The current models of standing exclude those with the ability to assist decision-makers, prevent consideration of views or collection of information (including that from impacted individuals and communities), and risk decisions that are not substantively sound or most beneficial to public interests. In multiple instances for

[242] Environmental Law Centre, *Environmental Rights in Alberta: Phase 1: Do we have the rights we need? Environmental rights today and in the future* (2016). http://elc.ab.ca/wp-content/uploads/2016/12/Environmental-Rights-PHASE-1-Do-We-Have-the-Right-We-Need-1.pdf

[243] Administrative Procedures and Jurisdiction Act, RSA 2000, c A-3 s 4.

both the AUC and the former ERCB/new AER, interveners have resorted to "strawman" or "piggyback" tactics to ensure that hearings would be triggered — such as when landowners, First Nations and local community groups who could pass the directly and adversely affected test would enter coalitions with environmental organizations that had capacity to assist with the public interest issues but which would otherwise be denied standing.

There are two categories of concern relating to the public interest that the current standing and participation regime neglects. Primarily, individual projects can still raise questions of public interest that are best addressed through hearings in which broader parties can participate to discuss specific questions and the merit of proposed projects. There needs to be a way to hear and address legitimate concerns around the interpretation or implementation of policy within the context of specific project approvals. These considerations should not be dismissed as being too broad in nature, which they may be under the current regime.

Secondly, although hearings aren't necessarily the only nor the best mechanism for public participation on issues such as broader cumulative effects, planning or policy, in practice hearings may be the only opportunity to discuss these considerations. Legislation in Alberta continues to provide almost no way to be heard at any other stage in process other than a project-specific regulatory hearing.

- There are no legislated requirements for public participation on the development of energy and natural resource policy with the exception of general public consultations on regional planning under ALSA.
- There are no consultations on the disposition of public land and natural resource rights, not even for private landowners under whose land oil and gas rights are sold.
- Consultations that are required to be conducted by proponents are felt by many to not represent meaningful public participation as they provide no access to decision-makers.
- There are no legislated opportunities to participate in the implementation of policy or enforcement of regulations other than through regulatory hearings.

Without more public involvement opportunities, hearings may have to address consideration of these issues through a project-specific lens.

The continued exclusion of parties bringing forth concerns in the public interest contributes to the constant criticisms around transparency of decision-making, accountability for public resources, and regulatory capture. Although credit can be

given to both the AER and the AUC for improving some matters of transparency, there are still many elements that remain unaddressed and exclusionary. If parties feel that public interest and environmental concerns are consistently unaddressed by both the approval process and a lack of participatory opportunities, frustration and lack of trust can still cause delay and increased costs to industry through further appeals, public campaigns on local concerns, and generally other negative outcomes that some parties may feel they need to use to raise awareness of their issues. Further, persistent denials of standing to persons impacted by decisions have a normative effect on the relative positions of interests in society and raise concerns with the health of democracy.

6.2 Moving towards broader standing

Both in Canada and abroad, the overall trend has been to expand the sphere of participation, to hear first from persons subject to regulatory decisions, then from other directly affected people, and now from a broader public. In Alberta, however, participation in the context of regulatory hearings has not broadened. Our findings show that although the standing tests have remained the same, especially in the case of the AER, the Regulator may have narrowed its interpretation and application of these tests.

The particular nature of both these bodies, coupled with policies and legislation that require decision-making to be made in the context of wider land use planning, suggest that a broad interpretation of standing and public interest is particularly important in the context of energy development in Alberta. Although there have been objections to both regulators for substantive issues with cumulative effects, the current directly and adversely affected test for standing fails to accommodate these considerations and instead allows both Regulators to defer to the regional plans, despite there being no mechanisms to raise these concerns through a regional planning process and that many plans are still incomplete.

Our research has shown that in jurisdictions that have broadened standing and participation, most concerns regarding opening the floodgates or enabling obstructionist behaviour have proven to be overstated. Examples include the Canadian courts in their adoption of public interest standing, and international appeal bodies such as the Land and Environment Court of New South Wales with very broad standing). There are rare instances where issues have occurred.

In Alberta, there is a very low number of hearings relative to the number of project applications processed by the AUC and AER (and former ERCB). In particular, the oil and gas regulators have an especially low ratio; in the last three years before the creation of the AER, the ERCB held roughly 8 to 12 hearings per year despite processing over 40,000 project applications a year.[244] Since the AER's establishment that ratio has further decreased; the AER held 4 hearings in both its 2014/2015[245] and 2015/2016 fiscal years while processing 47,000 applications.[246] Broadening standing to address substantive issues missed under current tests would likely have little impact on the total percent of matters that go to hearings as it is unlikely to produce the floodgate effect that may cause caution in regulators.

6.2.1 Case studies

It is prudent to highlight situations where including external parties that may not be capable of establishing direct and adverse effect, but that may be able to materially assist, may have a positive impact on the outcomes of final decisions. Since hearings and project approvals are the only formal way the concerns of other parties are included in the decision- making process, we can look to these hearings and project approvals to assess the benefits of broadening participation. Looking to the three AUC proceedings under the AUC, we can see outlined here instances within Alberta's context that illustrate the value of including a wider range of groups who can provide comments on substantive issues of concern in Alberta.

Genesee 3 power plant EUB approval

In 2001, Epcor applied to the Energy and Utilities Board (EUB) for an approval to construct an 490-megawatt expansion to the existing coal-fired power Genesee plant (Genesee 3). A hearing was scheduled, and several parties successfully applied to intervene, including Paul First Nation, the Kruger Group, the Clean Energy Coalition (CEC), and the Mewassin Community Action Group (MCAG). The Kruger Group, the CEC and MCAG had widely dispersed membership, but each had members who were located in sufficient proximity to the proposed plant as to convince the commission that their lands may be directly and adversely affected by the approval. The CEC, for example, was comprised of local landowners, other experts, and the Pembina

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245 Alberta Energy Regulator, *Annual Report 2014/2015* (2015). 86. https://www.aer.ca/documents/reports/201415_AERAnnualReport.pdf

246 Ibid., 3.

Institute. Some of these members would not have had standing under the directly and adversely affected rights test of the EUB.

A number of issues were discussed at the hearing, including concerns about the potential human health impacts, environmental effects, socioeconomic issues, and the technology and environmental performance of the plant.[247] The Board stressed the importance in determining if the project was in the public interest by assessing both the positive and negative elements of a project. It acknowledged that a proponent's adherence with standards and guidelines was an important element of deciding on an approval, but "where such thresholds do not exist, the Board must be satisfied that reasonable mitigative measures are in place to address the impacts".[248]

The CEC raised several concerns about the proposed unit's impact to human health, especially with regard to human health impacts outside what the coalition argued was an insufficient study area. Under examination, an Epcor air dispersion expert testified that 80% of emissions from the proposed project would be deposited outside the area of Epcor's environmental impact assessment. Since many of these pollutants had "demonstrable deleterious health effects", the coalition argued that the study area should be expanded; this was supported by both the Government of Canada and the Capital Health Authority. Additionally, the CEC raised concerns that the quality and extent of air quality data was insufficient to provide a baseline for a regional health assessment. [249]

The proposed plant's greenhouse gas emissions were discussed at the hearing as it represented an significant additional source of emissions in Alberta. Although Epcor had voluntarily committed to offsetting greenhouse gases to the equivalent of a natural gas combined cycle plant, the coalition raised concerns that the voluntary commitment was insufficient and the approval should require a 100% reduction in emissions or offsets as Epcor had voluntarily committed to in the past.

After serious concerns were raised by the CEC and other interveners on issues of monitoring and insufficient data on chemicals of potential concern, the board recognized the degree of uncertainty of impacts due to insufficient baseline data. The board approved the project with several conditions. Specifically, the Board required

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[247] *490 – MW Genesee Power Plant Expansion Application No. 2001173* (2001). Alberta Energy and Utilities Board Decision 2001 – 111.

[248] *ibid* s. 2.

[249] *ibid*, s 4.2.

Epcor to implement a community exposure assessment study;[250] to design, fund and implement monitoring programs in collaboration with other operators in the area;[251] to implement its voluntary commitment to offsetting emissions to match a natural gas combined cycle plant; and, to update offsets "to correspond to any future changes in emission standards for coal-fired power plants or a corresponding gas-fired power plant".[252]

Genesee 3 proposed amendment to offset commitments

After a restructuring that led to the creation of Capital Power Generation Services in 2011, Capital Power applied to the Alberta Utilities Commission for an amendment on its Genesee 3 approval with regard to the greenhouse gas offset commitments outlined in the original approval. Several interveners who participated in the original Genesee 3 approval, including the Clean Energy Coalition and the Mewassin Community Council, also successfully applied to intervene in the decision on the proposed amendment.

Capital Power argued that the obligations under the *Climate Change and Emissions Management Act,* enacted after approval of the Genesee III power plant, rendered the offsetting condition of the original approval "unnecessary and obsolete",[253] and that it should be removed as it put the company at an economic disadvantage.

The AUC considered the intent of the greenhouse gas offset requirement in the original approval in light of the Board's public interest considerations at the time.[254] Additionally, it considered the submissions of the original interveners, including the CEC's original concerns regarding the significant contribution to Alberta's greenhouse gas inventory and Mewassin's concerns about the adverse impacts of the plant's environmental emissions.[255] In the hearing on the amendment, the interveners submitted that the original intent of the condition was to meet or exceed any future greenhouse gas offsetting requirements if future requirements exceeded the conditions of the original approval, and provided evidence from the initial proceeding

[250] *ibid* 4.3.

[251] *ibid* s 9.

[252] *ibid* s. 5. 1. 3.

[253] *Amendment to Genesee 3 Power Plant Approval No. U2010-32* (2011). Alberta Utilities Commission Decision 2011-026: Capital Power Management Inc. and Capital Power Generation Services Inc., s. 1

[254] *ibid,* para 39

[255] *ibid*, para 42, 43.

that Epcor intended to meet or exceed the natural gas combined cycle requirements of the approval.

The Commission denied the application for amendment after finding that the condition was meant to address the concerns of the board and interveners in the original hearing.[256] It stated that the new regulations didn't supersede the conditions of the approval simply because these conditions were of a higher standard. It upheld the original condition and noted:

> "Although there are environmental standards under the Environmental Protection and Enhancement Act and the Climate Change and Emissions Management Act that apply to a proposed power plant or modifications to a power plant, the Commission is charged with considering whether the impact on the environment is mitigated by such standards or whether additional conditions are required to address the potential impacts specific to that application. As acknowledged by Capital Power, the existence of these environmental standards does not limit the Commission's power to impose a higher standard on a proposed power plant or modified power plant to mitigate potential environmental impacts based on the evidence before the Commission."[257]

Genesee 4 and 5 approval

In late 2013 Capital Power submitted an application for two additional natural gas-fired generation units adjacent to its existing units. This application process proceeded quite differently than those of the Genesee 3 application and the subsequent proposed amendment to offset obligations.

Objections were submitted by both the Strawberry Landowners Air and Water Group (SLAWG) and the Pembina Institute. Members of SLAWG and the Pembina Institute had both intervened under the Clean Energy Coalition in the previous Genesee approvals. Both again raised concerns about additional environmental impacts and cumulative effects, specifically with regard to an approval in an already overburdened

[256] *ibid,* para 56.

[257] *ibid*, para 48.

airshed, with "no guarantee that air emissions from coal generation will decrease before emissions from the proposed power plant are added."[258]

Despite receiving seven submissions regarding the application, including from several groups that had been granted standing in the previous Genesee power plant approvals, the AUC found that no parties had rights that were directly and adversely impacted by the application.[259]

As the AUC was not required to hold a hearing unless a proposed project will directly and adversely affect the rights of a person, the application was approved without a hearing.

6.2.2 The implications of standing in the Genesee cases

In the case of the Genesee 3 approval, interveners successfully raised issues with the proponent's environmental impact assessment, noting that the quality of data used for these assessments created uncertainties regarding the impacts of the project on central Albertan airsheds. In this hearing, interveners, including the Government of Canada, recognized that the potential adverse impacts on communities outside the 30-km study area was of concern; the board issued a series of conditions on the approval to address these concerns by expanding regional monitoring programs, and contributing to regional baseline health assessments. Additionally, a previously voluntary commitment for greenhouse gas offset reductions was made a condition of the approval after interveners raised concerns about the proposed project's emissions.

In the subsequent hearing on the 2011 proposed amendment to strike the offset requirements, the commission relied on the previous decision's intent to address intervener and Board concerns regarding greenhouse gas emissions, and further relied on comments submitted from these interveners in deciding the intent of the approval to meet any future regulations that exceeded the approval's requirements for greenhouse gas reductions. Although the decisions of the Board and later the Commission considered many factors, both decisions cited intervener concerns in their rationales, especially with regard to considering the public interest.

In the approval of Genesee 4 and 5, no interveners were found to have standing, as no party satisfied the Board's interpretation of direct and adverse effect. As the nearest

[258]. *Genesee Generating Station Units 4 and 5*. (2014), Decision 2014-226: Capital Power Generation Services Inc. para 13.

[259] *ibid*, para 48.

member of SLAWG lived approximately nine kilometres from the proposed unit, the standard of evidence required to establish a connection between the anticipated effects and the concerns raised was much higher than a potentially assumed connection between more local residents. The Commission dismissed this objection as SLAWG, and other interveners such as the Pembina Institute, could not establish this connection.

The inherent nature of this directly and adversely affected test, and the high standard of evidence to fulfill the requirements of the test, effectively prevented parties with concerns regarding the negative health and environmental impacts from cumulative effects to participate in the AUC's Genesee 4 and 5 decision. If a party had been found to be directly and adversely affected, then the AUC would have been required to hold a hearing, and may have considered the participation of additional parties. However, with no party with rights directly and adversely affected, no public discussion was possible on the merits and specific impacts of a project approval in an already overburdened airshed.

6.3 New types of regulatory proceedings?

6.3.1 AUC

In recent years, there have been little in the way of new regulatory proceedings under the AUC. The AUC's enhanced participation process adopted in 2010 was a positive improvement at the time that provided for a clear process early on, and indicated residents within 800 metres of a project were presumed to have standing. However, It can be considered primarily to provide efficiency for a hearing that was already determined to occur.

In 2011, the AUC considered options for participation in regulatory process as part of an inquiry that it held into the regulation of hydroelectric development. The inquiry considered proposals including a "genuine interest" test, different participation requirements geared to the scale of the project, and holding regional consultations rather than proceeding project-by-project. The inquiry favoured keeping the directly affected test but interpreting it more broadly.[260] However, this purported broader

[260] Alberta Utilities Commission, *Hydroelectric Power Generation Development Inquiry* (Calgary: Alberta Utilities Commission, 2011). http://www.energy.alberta.ca/Electricity/pdfs/HydroelectricPowerInquiry.pdf , at 7.7.3 and 7.7.4.

interpretation is not apparent in recent decisions concerning the question of legal rights. It may be more apparent in questions of fact given the more presumptive approach to standing based on geographic proximity.

6.3.2 AER

The legislative approach to REDA largely sees the AER as a work in progress. One repeat theme going back to the final years of the ERCB is the potential for new types of formal regulatory processes. Both the substantive nature of these initiatives and the implications for public participation affect the ongoing issue of how the regulator should consider cumulative effects.

Some examples include:

- **"Area-based" regulation** (in contrast to the former "play-based" regulation), which could mean that multiple operators within an area would be subject to the same development plans and regulatory rules; it could also mean that approvals for multiple stages of a project would be handled together.
- **Directive reviews**, such as current review of the tailings directive.

The common theme is that such processes could result in decisions of the regulator or in new regulatory instruments that affect specific geographic areas, mineral resources, industry sectors, activity types or impact types. All of the above concepts suggest a middle ground between project-specific decisions and regulations of general application.

The decision-making process would test the boundary proposed by the Regulatory Enhancement Project between policy development and policy delivery functions. The Regulatory Enhancement Project highlighted the regulator's role in developing policy and regulations, and implied a broader range of considerations in decisions of the regulator. This challenges the concept of streaming all public concerns into policy development and keeping regulatory proceedings for private concerns. It favours information, expertise, capacity and interest representation from persons beyond those who may be directly and adversely affected.

On the other hand, these are not, or should not be, politicized decisions resulting in high-level policy statements. Compared to regional planning under ALSA, these energy regulatory initiatives could have a narrower geographic scope, more focused or technical issues, and higher evidentiary needs.

General public consultations may not produce the best substantive decisions or legitimize the process. Open and unstructured participation could also raise greater efficiency concerns than occur in cases of mere policy development and it is fair to say that concepts like area-based regulation have efficiency goals.

Cumulative effects management frameworks under regional plans could theoretically serve many of the same purposes and provide appropriate participation processes. However these frameworks have not been developed for all regions or subregions subject to energy development pressure. In areas where they have been developed, there is uncertainty in the implementation and application of these plans and related frameworks, and there is lack of clarity in the binding direction that is given to the regulators.

The currently ongoing area-based pilot may begin to address this gap, but the overall approach is still largely a work in progress. There are several questions around what a new process would look like:

- What would be the triggers for proceedings if not standing?
- What new forms of plans, approvals or other regulatory instruments could result?
- How will the rules of practice be applied or diverged from?
- What roles and procedural rights will be provided for persons that are not directly affected?
- What would be the model of capacity support: upfront "participant funding" or back-end "costs"? How will it be determined, and who would pay for such support?
- What presentation opportunities could be provided beyond statements of concern or the holding of hearings?
- Are there other ways to realize the benefits of hearings such as access to decision makers, putting views on the record, testing evidence and producing reasons for decisions?
- How would standing in earlier stage proceedings carry forward or be different from standing at late stage proceedings?

Although the development of area-based regulation should certainly be viewed as a potential positive step in managing larger issues, these initiatives primarily respond to the need for the regulator to examine resource development with a wider temporal and spatial lens. If participation is appropriately included in the creation of these area-based plans, this process may provide reprieve from requests from interveners who currently have no other avenue to discuss issues related to cumulative effects and

standards regulating the industry. However, this process cannot be used as a justification for expediting future project approvals without examination or criticism, and should not bar parties from participating in a hearing if the merits or concerns of a project approval are called into question by potentially affected parties or the public at large.

Tailings Management Plan review

Although the AER's interpretation of standing has historically become narrower, an ongoing pilot that should be noted and watched closely is the AER's review of all fluid tailings management plans, initiated in the fall of 2016. For the first time, the AER has initiated an "enhanced participation" process. Specifically, the AER included in the notice of application for each fluid tailings management plan a second test for a party that could "materially assist the AER in its review" in addition to the AER's directly and adversely affected test.[261] Effectively, this creates a second category of standing, and is similar to other regulators discussed in the report.

Interestingly, this language parallels the AER's current Rules of Practice "Request to participate" provision.[262] The provision allows a party who isn't directly and adversely affected to explain what the "nature of their interest in the matter is and why they should be permitted to participate". They must also include an explanation of how:[263]

> (i) "the person's participation will materially assist the Regulator in deciding the matter that is the subject of the hearing
> (ii) "the person has a tangible interest in the subject-matter of the hearing"
> (iii) "the person's participation will not unnecessarily delay the hearing, and
> (iv) the person will not repeat or duplicate evidence presented by other parties"

The provision is typically read as a request to participate in a hearing that is already initiated. However this provision is ambiguous, as it does not clearly state that a hearing must be initiated before a party may submit a request to materially assist. In a general sense, this provision may allow parties who are not directly and adversely affected to request to participate, bypassing the statement of concern stage if they can establish their ability to materially assist.

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[261] Alberta Energy Regulator, "Application No. 1872083" (Notice of Application). Application No. 1872083 https://www.aer.ca/applications-and-notices/notices/application-1872083

[262] *Alberta Energy Regulator Rules of Practice*, s 9

[263] ibid, s 9 (c)

The enhanced participation process is a positive development that may be akin to adding a second test, but as it is still ongoing, much remains unclear. As much is still left to the discretion of the Regulator, there are lingering questions as how the AER will include these parties in the application review, including if these parties will be included in more formal proceedings such as a hearing.

Currently, the AER has not indicated it will apply the enhanced participation process with the additional test to other application reviews, but an expansion of the test to other decisions under its jurisdiction would be welcomed. If the enhanced participation process were to be expanded, further clarity is needed on how the AER will treat these requests, whether they will be considered formally in absence of statements of concern from a directly and adversely affected party, and whether information submitted by these parties will be enough for the regulator to recommend a hearing. Without this clarity, the enhanced participation process may not offer new opportunities for substantive matters to be considered in any other way than what the Regulator may currently exercise under its discretion.

6.3.3 A future participation framework

In 2014 the Environmental Law Centre held a workshop with a collection of persons who had practical experience with standing in Alberta. One of the exercises was to envision a "future participation framework".[264] The exercise examined the interconnectedness of standing and other process features, and provides a measuring stick for recent developments at the AER and AUC. There are multiple relevant examples from other jurisdictions in our analysis above that include elements of the envisioned framework.

The workshop's suggested future framework included components such as:

- improved test for standing that is broader than "directly and adversely affected" and would include others with a long connection to issue or helpful information
- guidance documents or criteria for the regulator to assist in determinations of standing
- address the challenges of participant funding and cost recovery
- provide process support for hearing participants to help them build capacity and improve their effectiveness

[264] Karla Reesor and David Hill, Environmental Law Centre Summit on Standing and Public Participation, Workshop Summary Report, Calgary, Alberta, October 2014 [unpublished].

- establish public forums for input into public policy that allow for voices to be heard and for informed debate
- promote or require broad project notification to help address surface issues and reduce need for participation in regulatory proceedings

Features of current regulatory process that the workshop favoured keeping included:

- early engagement by companies
- alternative dispute resolution
- pre-hearing meetings
- capacity assistance
- multi-stakeholder processes
- regulatory hearings that include standing for persons not directly affected

The components recommended from this workshop highlight a need to address the participatory system a bit more holistically. There is a clear recognition that hearings are not the solution to every problem, and should be appropriately supplemented with other tools such as early and broader notification and consultation, alternative dispute resolution, and public forums for policy discussions. However, a strong and successful participatory system at times requires a means for hearings on issues of concern, and broader participation is a principle of that. Some of these elements outlined in the vision have been improved upon by the current regulators, such as the AER's hearing services that supports participants when a hearing has already been triggered. However many of these basic elements, such as guidance documents for standing determination, remain unaddressed. The AER's pilot enhanced participation process discussed above may realize the vision's first component, and could be welcomed at the AUC for certain instances as well.

6.4 Possible approaches for reforming Alberta's energy regulators

There are several possible approaches to reforming standing and participation at both regulators that would address some of the considerations discussed above. Much of the commentary on the subject focuses on broader recommendations to reforming standing for agencies across Alberta, not just energy regulators, but is relevant nonetheless.

First, many standing reform recommendations can best be implemented through changes to statute. Although these have been the focus of most discussion to date, they also are the hardest to implement and least forthcoming.

Second, regulations or ministerial orders are a possible means to set substantive tests or criteria for standing. These may be easier to effect than a legislative approach.

Third, although there are more limitations in what regulators can implement through their own powers, opportunities for this exist and deserve more attention.

Although all three options to changing standing are covered below, the discussion focuses primarily on the third option.

Option 1: Legislative changes to broadening standing

There are multiple options for statutory reforms that would be relevant to both the AUC and the AER. An obvious approach would be to address issues concerning standing in the *Alberta Utilities Commission Act* and the *Responsible Energy Development Act*, the statutes mandating both regulators.

Much of the commentary favours abolishing legislated tests resembling the public nuisance rule,[265] which for both regulators would mean replacing the directly and adversely affected test with a test that would be broad enough to admit parties that could contribute to substantive environmental decisions without establishing a direct and adverse effect. This would enable standing to be determined more easily as a preliminary matter, and eliminate barriers of establishing evidence of harm and causation.

Additionally, legislating public interest standing in addition to current standing provisions, similar to what has been seen in the courts, is a favoured option. It is persuasive in that provides a means to address the issue of exclusion of parties that can add to substantive environmental considerations. A properly constructed test can screen for indicators of "genuine interest" such as purpose, objectives and a history of involvement with the issue or cause discussed.[266]

The creation of an environmental bill of rights is an additional approach, which could take the form of a cross-cutting statute that applies to multiple regulators and types of decisions. Alternatively, it may take the form of reforms to administrative

[265] *Supra* note *1,* 92. .

[266] *Supra* note *1*, 93.

procedure statutes. This model has been applied in Ontario, and allows citizens the right to be notified and comment on environmentally significant government proposals, the ability to seek appeal of a ministry decision, the ability to ask for a review of an existing law or to review the need for a new one, or to ask for an investigation of harm to the environment.[267]

Option 2: New regulations or ministerial orders

AUC

Cabinet regulations under the Alberta Utilities Commission Act

Under the AUC Act, Cabinet may make regulations under several circumstances. First, Cabinet has the power to clarify the commission's powers, duties and functions.[268] With regard to standing, this may provide a means to clarify the ability of the AUC to trigger hearings on its own motion, or to grant standing to further persons.

Second, Cabinet may make regulations "defining any word or expression used but not defined in this Act".[269] This option could provide for a definition of directly and adversely affected, or provide factors or criteria to consider in the determination of a directly and adversely affected party.

Additionally, Cabinet may make regulations on matters coming under the AUC Act that the Minister considers are "insufficiently provided for" in this Act.[270] Although contemplated as a temporary regulation until an amendment to statute or the matter has been dealt with through other regulations, the Minister could advise Cabinet that standing is not sufficiently provided for under the Act.

AER

Cabinet regulations under the Responsible Energy Development Act

REDA directly contemplates guidance from regulations on triggering hearings and granting standing.[271] Cabinet may make regulations on circumstances under which a hearing is required on applications, and may

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[267] Environmental Commissioner of Ontario, "What you need to know". Available at: https://eco.on.ca/your-rights/what-you-need-to-know/

[268] AUC Act*, supra* note *158,* s.75(a).

[269] *Ibid.* s.75(b).

[270] *Ibid.* s.79(1).

[271] REDA S.60.

- describe persons or classes of persons as eligible persons for purpose of regulatory appeals
- describe decisions or classes of decisions as appealable decisions
- make regulations on circumstances under which a hearing is required on regulatory appeals and hearings required on reconsiderations.

This is another excellent option for reform, as it is easier than statutory reform and provides policy and political direction to the Regulator. Reforming through regulations provides parties with the ability to enforce the procedural rights afforded under the regulations, and provides permanence that is not achieved through changes to administrative practice.

Specifically, changes through regulations can fill the gap for a lack of hearing triggers. It could potentially provide for broader interpretation of the directly and adversely affected test, prescribe an additional public interest standing test, and clarify hearing triggers for substantive issues.

Ministerial directives (orders)

The minister may by order give directions to AER for purpose of providing priorities and guidelines for the AER in carrying out its powers, duties and functions.[272]

REDA s. (67) Direction to the Regulator

67(1) *When the Minister considers it to be appropriate to do so, the Minister may by order give directions to the Regulator for the purposes of*

> (a) providing priorities and guidelines for the Regulator to follow in the carrying out of its powers, duties and functions, and
>
> (b) ensuring the work of the Regulator is consistent with the programs, policies and work of the Government in respect of energy resource development, public land management, environmental management and water management.

Although ministerial orders are not generated by the AER, it is the easiest means to get clarity on issues of policy that the AER may not be believe it has the jurisdiction to initiate. It has been provided to the AER in the past, such as with Ministerial Directive 141/2013, Aboriginal Consultation Direction.[273]

[272] REDA S.67.

[273] Government of Alberta, Aboriginal Consultation Direction, http://www.energy.gov.ab.ca/Org/pdfs/MO141_2013woSignature.pdf

A ministerial order can be used to provide the regulator direction on matters of participation, standing, or costs in instances where the statue may not provide the clarity or jurisdiction needed. It provides an easier way to establish changes than cabinet regulations, and may be lower profile than changes made through regulations or changes to statute.

Option 3: Regulator-initiated changes to their own rules and practices

AUC

The AUC has the power to make rules under *Alberta Utilities Commission Act 76(1)* "governing any matter or person under its jurisdiction" including "rules of practice governing the Commission's procedure and hearings".[274] This includes, but is not expressly limited to, rules on notice of applications, rules on the conduct of hearings, and rules on when applicant may show that hearings are unnecessary.[275]

The AUC may be able to amend rules on matters of objections or participation to provide for a broader consideration of parties and/or rights without needing Cabinet regulations or changes to the AUC Act. For example, the AUC could make rules requiring provision of notice to specific areas or interests or on the basis of anticipated issues, then provide for consideration of requests for hearings from persons receiving notice.

However, the AUC's expressed authority is to make rules that are more procedural in nature compared to the AER, and several examples resemble the AER directives in that they are externally focused and do not address more substantive issues of participation. The commission may have comparatively less authority than the AER to include additional tests to allow for participation for a hearing that isn't already recommended due to the limited topics of AUC rules contemplated by the statute.

AER

REDA may have provided more options for reform at the level of the regulator than exist now for the AUC or in the past for the ERCB.

Compared to these other models, the AER does have tools to implement changes to the participatory system, specifically with regard to reform under its Rules of Practice. The AER has the power to make rules under REDA (s.61), regarding how statements of

[274] *Alberta Utilities Commission Act, 76(1).*

[275] *Ibid.* s.76(1)(b),(e) and (g).

concern, regulatory appeals and reconsiderations are conducted. Rules can be made regarding:[276]

- statement of concern (form, contents, manner to be filed)
- hearings (conduct)
- regulatory appeal (form and content of request, manner requests are filed, nature and scope of a regulatory appeal, conduct of a regulatory appeal)
- reconsideration (nature and scope, conduct)
- consideration of information, documents, evidence (disclosure, confidentiality, sharing, procedures)
- publishing decisions (applications, regulatory appeals and reconsiderations)

Rules can also be made by the Minister of Energy, and these prevail over rules made by the regulator.

As the AER has broad discretionary powers with no clear trigger when it is to hold a hearing, and its legislation is relatively new and untested, as an agency it may be able to exercise more flexibility in creating rules than the AUC.

6.5 Recommendations for reform through administrative changes

6.5.1 Clarify hearing triggers

Recommendation: Expand AUC Rules of Practice to provide guidance on factors that it may consider for a hearing held at its discretion

The *Alberta Utilities Commission Act* requires the AUC to hold a hearing when a directly and adversely affected person requests one, but the AUC has the ability to hold a hearing at its discretion as the Act expressly allows the AUC to act "on its own motion or initiative" in the performance of its functions.[277] The Rules of Practice could be expanded to include factors that the AUC will consider when holding a hearing at its discretion. This may direct consideration of substantive issues under the AUC's public interest considerations, and not just rights that may indicate direct and adverse effect. Examples of this may be development on public lands, development in an area

[276] Responsible Energy Development Act, s. 61.

[277] Alberta Utilities Commission Act, s.8(2).

of unresolved cumulative effects, or projects that were formerly covered under a federal environmental assessment.

Recommendation: Expand AER Rules of Practice to provide guidance or rules on when hearings must or may occur

Currently, the AER has very broad discretion in many areas of its decision-making authority (considering a statement of concern, elements of statement of concern, whether or not to recommend a hearing, who to include in a hearing). This can create issues, as no one — project proponents or other parties — has clarity on when a hearing may occur. This uncertainty affects not only those who seek an opportunity to speak in a hearing, but also project proponents and industry who need certainty for planning their operations.

The AER Rules of Practice outline factors that it may consider when deciding to recommend an application for a hearing.[278] These factors have been described as more dismissive,[279] as they mainly address matters that would suggest the regulator would not recommend a hearing. These rules should be expanded to include factors that the Regulator should consider or situations where hearings are required to trigger a hearing. These rules can direct the regulator to consider substantive issues, to counter a preference for direct and adverse effect and an impact on clear rights. These factors could consider circumstances that require further deliberation, such as development on pubic lands, projects that fall within hotspots of unresolved cumulative effect issues, or types of projects that are no longer covered under federal environmental assessments. This approach still affirms the discretion of the regulator to trigger hearings, a discretion that already exists under the current legislative framework.

Recommendation: Amend AER Rules of Practice to require all decisions to be published, including statements of concern that lead to a recommendation for a hearing

[278] Alberta Energy Regulator Rules of Practice, s 7.

[279] Fluker, Shaun. "Amended Rules of Practice for the Alberta Energy Regulator: More Bad News for Landowners and Environmental Groups" (December 11, 2013). http://ablawg.ca/2013/12/11/amended-rules-of-practice-for-the-alberta-energy-regulator-more-bad-news-for-landowners-and-environmental-groups/

Currently the AER publishes many of its decisions, but has not included statements of concern on applications if they were recommended for a hearing. Publishing all decisions would be an extension of the regulator's more recent choice to begin posting some of its decisions. This is also consistent with the practice of the AUC.

As not all decisions are currently published, there is a severe lack of clarity of who has been considered to be a directly and adversely affected party by the AER in the past. Coupled with the AER's broad discretion, this is an issue of transparency which remains problematic. Amending the rules of practice to ensure the regulator is procedurally consistent is clearly within the regulator's powers.

6.5.2 Shift interpretation of standing tests

Recommendation: Interpret "directly and adversely affected" more broadly

Expanding the interpretation in this way would not require a change to statute, regulations or the rules of practice for either regulator.

The AUC appears to apply its test for standing more broadly, relative to the AER. The commission's use of an 800 m distance 'test' in many of its recent transmission line decisions is an expansion of its application of using geographic proximity as a means to establish a direct effect. Our research suggests however that the 'rights' that must be directly and adversely affected may still remain narrowly interpreted in practice, favouring property rights and Aboriginal or treaty rights as they are a clearly recognizable right.

The AER has internal discretion on determining who is directly and adversely affected, as long as they are consistent with the courts. The regulator could simply broaden its application of standing as the AUC and other Alberta regulators may already be doing, without changing its rules of practice, but this fails to provide some of the necessary clarity of consideration that amended rules could provide.

There are still issues and questions about this approach for both regulators. One outstanding question is whether or not a "broader" approach to the same test would entail recognizing a wider range of interests that may be affected. For example, the stewards of a wildlife habitat project may lack an enforceable right; however, if this type of interest is recognized then they might prove that they are directly and adversely affected as a question of fact. An advantage of recognizing this type of "sweat equity" interest is that the same parties with sufficient personal interests to

pass the directly and adversely affected test might also have the information and expertise to assist the regulator. If these interests aren't recognized through a broader interpretation, regulators may lose the benefit of additional perspectives, as they may otherwise only hear from many of the same rights holders as in the current approach. This may undermine certainty and efficiency without clearly increasing the range of information available to assist decisions.

Lastly, even with a broader interpretation, the articulation and application of the test may remain inconsistent within an agency. Guidance on when standing should be granted can be given through amendment to either regulator's rule of practice by adding more permissive factors to consider in an objection or a statement of concern.

6.5.3 Create more criteria for standing

Recommendation: Amend the AER Rules of Practice to include a second category of standing or party consideration

It may be that the AER has the discretion to include a second category of standing, as seen with AER's more recent pilot, discussed above, to include parties who can "materially assist" with a decision through the new "enhanced participation" process. The creation of a second test would enable the Regulator to initiate hearings to specifically include parties that aren't captured by direct and adverse effect, but who can assist on substantive issues in the public interest through contributions such as relevant information, expertise, capacity or interest. This would be aligned with federal environmental assessments, and regulators in other provinces.

Given that the Regulator has begun to test this, it may be a palatable option for the Regulator to expand this test across its decision-making processed. However, an approach of this sort would be contrary to the recent trends of the AER regarding increasingly narrow interpretations of standing.